

21-1920-cr

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— v. —

ARI TEMAN, AKA Sealed Defendant 1,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume 2 of 11 (Pages A-129 to A-240)

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- UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

required to prove his innocence; the Government is required to prove his guilt—and to do so beyond a reasonable doubt. Is there anybody who does not believe in these ideals? Is there anybody who will not hold the Government to its burden of proof?

4. Has anybody here ever been a juror in a criminal case before? If so, (a) What kind of criminal case? (b) Was the jury able to reach a verdict? (c) Were you the foreperson?
5. Has anybody here ever served on a grand jury? If so, (a) Were you the foreperson? (b) Do you understand that the burden of proof in a grand jury or in a civil case is lower than what the prosecution must prove in a criminal case?

Knowledge of Persons and Parties Involved in the Case

6. Do you or any members of your family or friends know the Honorable Paul Engelmayer? If so, how do you know him? Would that relationship or acquaintance influence your judgment in this case?
7. Do you or any members of your family or friends know any of the prosecutors or anyone who works in the U.S. Attorney's Office here in the Southern District of New York?
8. Have you, a family member, or a close friend ever been employed by the U.S. Department of Justice, the NYPD, or the U.S. Attorney's Office for the Southern District of New York?
9. This case was investigated by the NYPD, specifically by Detective Daniel Alessandrino. Does any member of the panel know NYPD Detective Alessandrino? Does anyone know anyone who currently works for a law enforcement agency?
10. The defendant is Ari Teman. Does anybody know Mr. Teman?
11. Mr. Teman is represented by Justin Gelfand and Joseph DiRuzzo. Does anyone know either of these two attorneys? Mr. Gelfand was previously a federal prosecutor with the U.S.

Department of Justice in Washington, D.C. Did anyone have any interactions with Mr. Gelfand in his capacity as a federal prosecutor?

12. Has any member of the panel, a family member, or a close friend ever been employed by the United States Government? If so, who and how?
13. Has anybody seen, heard, or read anything about this case? If so, what have you seen, heard or read? (At sidebar so as not to prejudice other members of the panel.) Have you formed any opinions about this case based on what you saw, heard, or read?
14. Has anybody discussed any aspect of this case with anybody who claimed to have some knowledge about what may have happened? If so, what have you heard (at sidebar) and have you formed some opinion based on what this person told you?
15. Does anybody know any other member of the jury panel? If so, who are you acquainted with, and how do you know that person? Would that relationship or acquaintance influence your judgment in this case?
16. Does any member of the panel have any legal education or training, or has anyone ever worked in any capacity in a law firm or a law office?
17. Does anybody know any of the following people who may testify in this trial (Court asked to read list of possible witnesses including the names of the entities involved)?

Victims of Crime

18. Have any of you ever been victims of crimes or have you had a relative or close friend who was the victim of a crime? If so:
 1. Was anyone apprehended as a result of that crime?
 2. Did you testify in that case?

3. Were you satisfied with the outcome of that case? (Why or why not?)
4. Did you feel justice was done? (Why or why not?)
5. Is there anything about that experience that you believe could influence your judgment in this case?

Witnesses

19. Have any of you ever been witnesses in a trial? If so:
 1. Was it a criminal or civil trial?
 2. What kind of case was it?
 3. Was there anything about that experience that you found unpleasant?
 4. Was there anything about that experience that could influence your judgment in this case?
20. Would anybody be influenced by the sheer number of witnesses who may testify for the prosecution or for the defense? Does anybody think that if the defendant calls no witnesses, he/she would be unable to make a decision as to whether the prosecution proved the defendant guilty beyond a reasonable doubt?
21. Would any of you give greater weight or credibility no matter how slight to the testimony of a law enforcement officer?
 1. Is there anyone who believes he/she would be unable to judge the credibility of a law enforcement officer's testimony just like everyone else?
 2. Is there anyone here who would tend to give a law enforcement officer's testimony greater weight or credibility, or lesser weight or credibility, just because that person is a law enforcement officer? For example, if two people have different

recollections about an occurrence and one is a police officer, would you tend to believe the police officer over the civilian just because that person is a police officer?

22. Would any of you give the testimony of a Government witness greater weight or credibility over that of the testimony of witnesses on Mr. Teman's behalf, just because that person was testifying for the Government?
23. Do any of you believe that you would have any difficulty being asked to judge the honesty and credibility of a witness?
24. If you are selected as a juror in this case, you may be instructed later on that when considering the credibility of a witness, you can consider any biases or prejudices that the witness may have or any motives the witness may have for telling the truth or not telling the truth; do you all understand that concept? Does anybody have a problem considering that a witness may not be telling the truth even if that witness takes an oath in this courtroom and promises to tell the truth?

Instructions

25. Does anybody here think that because Mr. Teman has been charged with a crime, he must have committed the crime?
26. Does anybody here have any opinion at all about whether Mr. Teman is guilty or not guilty in this case before hearing the evidence?
27. Does everybody understand that Mr. Teman is by law presumed innocent?
28. Does anybody here feel that Mr. Teman must have done something illegal or he would not have been charged with a crime?

29. Does anybody here feel that, in criminal cases, the Government is usually right?
30. Does anybody here have any difficulty with the concept of passing judgement on another?
- In other words, there are some people who for moral, ethical or religious reasons, believe that it is not proper to pass judgment on the conduct of others. Do any of you hold such beliefs?
31. If you are selected to sit on the jury in this case you will have one of twelve votes. Will you agree to independently decide whether the Government has proven Mr. Teman guilty beyond a reasonable doubt even if other members of the jury disagree with you?
32. Does anybody feel like defendants in a criminal trial should have to prove that they are innocent?
33. Is there anyone here who does not understand that an indictment is not evidence that the crime charged was committed, and it may not be considered as evidence by you in deliberating?
34. Do you understand that Mr. Teman has pled not guilty and that he has a Constitutional right to a presumption of innocence—that is, he is innocent unless the Government is able to prove otherwise and to do so beyond a reasonable doubt?
35. Do any of you have any difficulty presuming that Mr. Teman, as he sits here before you, is innocent?
36. Does the panel understand that the Government is required by law to prove Mr. Teman guilty beyond a reasonable doubt, if they are able to?
1. Is there anybody here who does not agree with that? In other words, is there anyone here who believes it is Mr. Teman's duty to prove himself innocent?

2. Do you all understand that “beyond a reasonable doubt” is the highest burden of proof required by the law?
37. If the Government fails to meet that high burden of proving Mr. Teman guilty beyond a reasonable doubt, is there anyone who does not understand that you must find Mr. Teman not guilty?
38. Is there anyone who would feel that by not returning a guilty verdict, your job as a juror is incomplete or a failure?
39. Do you all understand that Mr. Teman may or may not testify in this case, but that he does not have to testify in this trial, and that nothing can be inferred from him not testifying?

Banks and Financial Institutions

40. Is there anybody who holds any strong personal or philosophical feelings about the banking system of the United States? If so, what are your feelings?
41. Does any member of the panel have any ownership (for example, stock) in any bank or financial institution such as Bank of America?
42. Has any member of the panel every worked at any bank or financial institution?
43. Does anyone have a close friend or family member that has worked at a bank or financial institution?
44. Has anyone ever worked at a financial regulator such as the FDIC or the OCC? Does anyone have any close friends or family members who have held such jobs?
45. Has anyone ever worked at a real estate company such as a REIT or a property management company? Does anyone have any close friends or family members who have worked at a real estate or property management company?

46. Does anyone have any strong feelings about landlords in New York City?

Respectfully submitted,

Margulis Gelfand, LLC

/s/ Justin K. Gelfand

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Certificate of Service

I hereby certify that I filed the foregoing through the Court's CM/ECF system which will provide notice of filing to all counsel of record.

/s/ Justin K. Gelfand
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Attorney for Teman

A-137.1

XK1AHEM

SEALED

1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 696 (PAE)

5 ARI TEMAN,

6 Defendant.

Conference

7 -----x
8 New York, N.Y.
9 January 10, 2020
10 10:45 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14 APPEARANCES

15
16 GEOFFREY S. BERMAN
17 United States Attorney for the
18 Southern District of New York
19 KEDAR SANJAH BHATIA
20 EDWARD IMPERATORE
21 Assistant United States Attorneys

22 JOSEPH ANDREW DIRUZZO III
23 JUSTIN GELFAND
24 Attorneys for Defendant

25 Also Present: William Magliocco, Paralegal Specialist USAO

A-137.2

XK1AHTM

SEALED

2

(In the robing room)

1 THE COURT: All right. Good morning, everyone. I'm
2 here in my robing room with counsel for both sides,
3 specifically Mr. Imperatore and Mr. Bhatia. Good morning to
4 both of you. Happy New Year.

5 MR. IMPERATORE: Good morning, your Honor.

6 THE COURT: For the defense, Mr. DiRuzzo?

7 MR. DIRUZZO: Yes.

8 THE COURT: And Mr. Gelfand?

9 MR. GELFAND: Good morning.

10 THE COURT: And the defendant, Mr. Teman, good
11 morning.

12 THE DEFENDANT: Good morning, your Honor.

13 THE COURT: The initial part of this conference, very
14 briefly, will be maintained under seal. I have a court
15 reporter here, but the transcript of what is to be said in the
16 robing room here is to be accessible to counsel in this case
17 only. The transcript itself is, not without permission of the
18 Court, to be publicly filed.

19 I want to follow up on a phone conference we had in
20 December prompted by Mr. Teman's note to me that was in
21 considerable distress. I'm really just concerned about how
22 Mr. Teman is doing. Can counsel give me an update as to how
23 he's doing.

24 MR. DIRUZZO: Your Honor, my understanding is
25

XK1AHEM

SEALED

3

1 Mr. Teman is doing fine. No further instances have happened,
2 nothing that required hospitalization or the like, so --

3 THE COURT: Have you been personally keeping tabs on
4 the state of whatever treatment he is receiving?

5 MR. GELFAND: Your Honor, this is Justin Gelfand for
6 the record. I have been speaking regularly with Mr. Teman, and
7 it's my understanding that he's been under the care of multiple
8 healthcare providers, including a mental health care provider,
9 and a sleep specialist. There was a diagnosis, as I understand
10 it. Maybe that's too strong of a word, but Mr. Teman has
11 managed to get his sleep situation better under control, and he
12 has expressed to me that he's noticed a considerable difference
13 based on that and following that care.

14 So, as a practical matter, I think that under the
15 circumstances, obviously, the case is inevitably very
16 stressful, but he's doing well under the circumstances and
17 certainly much better than when we had our other telephone
18 conference.

19 THE COURT: I'm glad to hear that. I had remembered
20 that it had been expressed on the call that sleep problems may
21 have been at the heart of some of the anguish in the note. I'm
22 glad to hear that's being addressed.

23 MR. GELFAND: Yes, your Honor.

24 THE COURT: May I address your client. I don't want
25 to pry, but I want to make sure.

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4

1 MR. GELFAND: Sure.

2 THE COURT: Mr. Teman, I want to take stock on how
3 you're doing.

4 THE DEFENDANT: It's not the best six months of my
5 life, but I went to an ENT and then a sleep specialist. The
6 ENT said walk three miles a day, which is just looping around
7 South Beach. I did that, then I went to the sleep specialist.
8 He said you're under federal indictment. I'm going to give you
9 this drug, and it's going to get you five hours of sleep.

10 Still do the walking and swimming, but the drug is winning. I
11 wasn't getting REM sleep. So I have a tracker. I was getting
12 5 to 6 percent REM. I'm getting 20 to 25 percent REM now.

13 THE COURT: Here's the important thing. The emotions
14 that you expressed in that letter, to the extent that they were
15 an impulse to hurt yourself, have those gone away?

16 THE DEFENDANT: Yes.

17 THE COURT: You're confident that you are in a better
18 place. I realize being under indictment is not a good place,
19 but your suicidal state of mind is all gone; you have no
20 impulses like that at all?

21 THE DEFENDANT: None.

22 THE COURT: Will you promise me if you have any
23 impulse at all like that, you'll immediately notify both your
24 counsel in this case, the specialist or specialists whom you
25 are seeing?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: Very good. Anything further I need to
3 raise as to any of those things?

4 MR. BHATIA: Nothing from the government.

5 THE COURT: Most of all, I want to wish you well. I
6 realize I'm here in a role presiding over a prosecution of you.
7 I'm also a human being, and I read a note from a person in
8 anguish and pain. And I empathize with you, and I just wanted
9 you to know that.

10 All right. Look, the other thing I just want to put
11 on the record is as follows, which is after the last court
12 conference in the case, I made a phone call to the chief of the
13 general crimes unit, the supervisor of the AUSA that's assigned
14 to the case, asking him to take a look at the transcript of the
15 previous conferences and to make sure that there was adequate
16 supervision of the case. I do that from time to time when I
17 have a concern that there may or may not be adequate
18 supervision. I didn't want that conversation to have been
19 unrecorded. I'm putting that on the record here.

20 MR. GELFAND: Thank you.

21 THE COURT: Very good. I'll see you out in the
22 courtroom. Thank you.

23 (Adjourned)

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 696 (PAE)

5 ARI TEMAN,

6 Conference

7 Defendant.

-----x

8 New York, N.Y.
9 January 10, 2020
10 11:00 a.m.

11 Before:

12 HON. PAUL A. ENGELMAYER,

13 District Judge

14 APPEARANCES

15 GEOFFREY S. BERMAN
16 United States Attorney for the
17 Southern District of New York
18 KEDAR SANJAH BHATIA
19 EDWARD IMPERATORE
Assistant United States Attorneys

20 JOSEPH ANDREW DiRUZZO III
21 JUSTIN GELFAND
Attorneys for Defendant

22 Also Present: William Magliocco, Paralegal Specialist USAO
23
24
25

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1 (Case called)

2 MR. BHATIA: Good morning, your Honor. Kedar Bhatia
3 and Edward Imperatore, for the United States. We're joined at
4 counsel table by Will Magliocco, a paralegal specialist in the
5 U.S. Attorney's Office.

6 THE COURT: Good morning, Mr. Bhatia.

7 Good morning, Mr. Bhatia.

8 And good morning to you, Mr. Magliocco.

9 MR. DIRUZZO: Good morning, your Honor. Joseph
10 DiRuzzo, on behalf of Mr. Ari Teman.

11 THE COURT: Good morning.

12 MR. GELFAND: Good morning, your Honor. Joseph
13 Gelfand on behalf of Ari Teman, who is present and on bond.

14 THE COURT: Good morning to both of you.

15 Good morning to you, Mr. Teman.

16 All right. We have a formidable agenda before us
17 today, and I want to, before marching through it, identify by
18 topic header the sequence of topics I intend to go through.
19 And of course, if I have missed anything, there will be an
20 opportunity at the end for you to raise other issues.

21 Step one will involve arraigning Mr. Teman on the S2
22 indictment. I then will take up with the government Rule 16
23 discovery, what, if any, Rule 16 discovery has been produced
24 since the last conference and whether anything, improbable as
25 it might seem, is outstanding. I will then resolve all of the

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1 motions *in limine* that are pending in a bench ruling. That
2 will take some time.

3 The next module I will discuss with you is the length
4 of trial and my sitting schedule during the course of the
5 trial, the daily schedule that we have here, just so we're all
6 on the same page. I think of all of you, Mr. Imperatore is the
7 only one who been on trial before me, so I want to make sure
8 all aware of that.

9 I will then have an extensive discussion about aspects
10 of voir dire, including the method that I use for voir dire and
11 including a summary of the case that I intend to present to the
12 venire which I want to run by counsel for their comments. I
13 will then take up issues of courtroom technology with you.
14 Then there will be some mechanical issues about where witnesses
15 are to be questioned from and jury addresses, and the like. I
16 will take up then issues with you about materials I need to be
17 provided to my chambers, whether in the context of 3,500
18 material, exhibit binders, a daily exhibit list, that sort of
19 thing. I want to raise a question about the verdict form. I
20 need to put on the record any plea offers that have been made
21 to the defendant, as far as this is our final pretrial
22 conference, and then there's a final grand jury matter that I
23 have a word or two about.

24 All right. That's the agenda. So that's the sequence
25 in which you can expect me to proceed. Let's begin with the

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1 arraignment of Mr. Teman.

2 Defense counsel, who will be taking the lead at this
3 conference?

4 MR. GELFAND: I will, your Honor, Justin Gelfand.

5 THE COURT: Very good. Thank you, Mr. Gelfand.

6 Have you had an opportunity to review with your client
7 the questions that I am apt to put to him by way of arraigning
8 him on the S2 indictment?

9 MR. GELFAND: Yes, your Honor.

10 THE COURT: All right. Mr. Teman, I'm going to have
11 Mr. Smallman administer the oath to you; and then I'll ask you
12 several questions to make sure you're of clear mind; that
13 you've read the S2 indictment; and I will receive your plea,
14 which I expect, from counsel's preview, will be a not guilty
15 plea.

16 Mr. Smallman, will you swear the defendant.

17 (Defendant sworn)

18 THE COURT: Thank you.

19 Mr. Teman, you may be seated. What is your full name?

20 THE DEFENDANT: Ari Baruch Teman.

21 THE COURT: How old are you?

22 THE DEFENDANT: 37.

23 THE COURT: How far did you go in school?

24 THE DEFENDANT: College and some additional
25 coursework.

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1 THE COURT: All right. I know the answer to this
2 question, but are you able to speak and read English?

3 THE DEFENDANT: Yes.

4 THE COURT: I understand that you are presently under
5 the care of a medical professional?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: All right. Apart from what we covered in
8 the robing room, are you under the care of any other medical
9 professional?

10 THE DEFENDANT: Not on any ongoing basis, your Honor.

11 THE COURT: All right. In the past 24 hours, apart
12 from sleep medication, have you taken any drugs, medicine, or
13 pills, or drunk any alcoholic beverages?

14 THE DEFENDANT: No, nothing unrelated to sleep.

15 THE COURT: Does the sleep medication impair your
16 ability to understand what people are saying to you?

17 THE DEFENDANT: I don't believe so.

18 THE COURT: Does it impair your ability to
19 communicate?

20 THE DEFENDANT: No, I don't think so.

21 THE COURT: Does it impair your reasoning ability?

22 THE DEFENDANT: I don't think so.

23 THE COURT: Is your mind clear today?

24 THE DEFENDANT: Feels like it is, your Honor.

25 THE COURT: Is there any reason to think that it is

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1 not?

2 THE DEFENDANT: No, your Honor.

3 THE COURT: Do you understand what's happening in this
4 proceeding?

5 THE DEFENDANT: Yes.

6 THE COURT: Mr. Gelfand, are you confident that your
7 client understands what's happening in this proceeding and is
8 capable of making an informed plea as to the charges in the S2?

9 MR. GELFAND: Yes, your Honor. For the record, I've
10 spent approximately an hour and a half with him this morning as
11 well.

12 THE COURT: And that confirms your confidence that his
13 mind is totally clear?

14 MR. GELFAND: It does, your Honor.

15 THE COURT: All right. Mr. Teman, have you received a
16 copy of the most recent indictment, the S2 indictment, returned
17 on January 3?

18 THE DEFENDANT: Yes, your Honor.

19 THE COURT: Have you had an opportunity to -- have you
20 read it?

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: Have you had an opportunity to consult
23 with your attorneys about it?

24 THE DEFENDANT: Yes, your Honor.

25 THE COURT: Do you want me to read it out loud, or do

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1 you waive its public reading?

2 THE DEFENDANT: I waive the reading, your Honor.

3 THE COURT: Thank you.

4 How do you plead to the charges?

5 THE DEFENDANT: Not guilty.

6 THE COURT: Having taken care of the arraignment, I
7 think I need to formally ask defense counsel the following:
8 The new indictment does not appear to add new events so much as
9 add charges relating to existing events. Nevertheless, just as
10 an excess of caution, it appears to me that everyone's fully
11 prepared to go to trial on the date indicated, but I want to
12 ask you just to confirm that.

13 MR. GELFAND: Yes, your Honor.

14 THE COURT: Very good. All right. Government, same?

15 MR. BHATIA: Yes, your Honor.

16 THE COURT: Anything else that anyone believes I need
17 to take up by way of arraignment or related events?

18 MR. BHATIA: Nothing from the government.

19 MR. GELFAND: No, your Honor.

20 THE COURT: OK. Let's turn to Rule 16 discovery.

21 Mr. Bhatia, I realize you are a newcomer to the case, and I
22 appreciate your taking it over. Since the last conference, has
23 there been any Rule 16 discovery that the government has come
24 into possession of and/or that has been produced to the
25 defense?

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1 MR. BHATIA: Yes, your Honor. We've been producing --
2 we made at least two or three productions since then on a
3 rolling basis as we've received documents. Those documents
4 have principally consisted of bank records and email
5 correspondence that we've received from particular witnesses in
6 the case. I think that's sort of the substance of it.

7 THE COURT: What's the scale of the new material?

8 MR. BHATIA: Not too voluminous. I think, for the
9 emails, they were maybe in the 100 to 200 range.

10 THE COURT: 100 to 200 emails?

11 MR. BHATIA: Emails, yes. I don't think it's been
12 particularly voluminous, and we don't expect any voluminous
13 discovery in the future. But, of course, we don't know, but I
14 don't expect any.

15 THE COURT: Is there any outstanding Rule 16 discovery
16 that is in your possession, custody, or control that has not
17 been produced to the defendant?

18 MR. BHATIA: Yes, your Honor. As we get closer to
19 trial, we're producing on a rolling basis, so I think we might
20 have received documents yesterday or maybe the day before that
21 we're planning to produce today, but nothing that we're waiting
22 to produce.

23 THE COURT: Do I have your commitment that, to the
24 extent you come into possession of Rule 16 discovery, you will
25 quite properly turn it around for the defense?

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1 MR. BHATIA: Yes, your Honor.

2 THE COURT: All right. Defense, anything with respect
3 to ongoing discovery?

4 MR. GELFAND: No, your Honor. We received discovery,
5 as government counsel indicated, on a rolling basis. The most
6 recent production of that was electronically produced
7 yesterday. Because we were traveling, we haven't yet had a
8 chance to review it, but I accept the government's
9 representations as to the nature of it.

10 THE COURT: So far, to the extent you've gotten new
11 discovery, I take it none of it is on a scale that inhibits
12 your trial preparation?

13 MR. GELFAND: No, your Honor. The other thing I would
14 note for the record is that we too, on behalf of the defense,
15 have disclosed Rule 16 discovery to the prosecution in several
16 disclosures, also on a rolling basis, much like the prosecutor.
17 We did have a couple of requests for documents outstanding.
18 Obviously, to the extent that we receive those documents and to
19 the extent that it falls under Rule 16, we'll that provide that
20 forthwith to the government.

21 THE COURT: There's nothing along those line for me to
22 resolve, but I appreciate your giving me a heads-up about that.

23 Nothing further vis-a-vis discovery?

24 MR. BHATIA: Nothing.

25 MR. GELFAND: Correct.

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1 THE COURT: I'm going to turn now to a bench ruling
2 that I have on the *in limine*. All right. Here goes.

3 Defendant, Ari Teman, has been charged with bank
4 fraud, wire fraud, and aggravated identity theft. His trial is
5 set to begin on January 21, 2020. The Court has received *in*
6 *limine* from Teman and the government and has also received
7 opposition papers from each.

8 The following bench decision resolves all these
9 motions. I will not be issuing a written decision. Instead, I
10 will simply issue an order reflecting the fact that the motions
11 were resolved for the reasons set forth on the record today.
12 So if the content of what I say today is important to you, you
13 will need to order the transcript of this conference, as I
14 expect you would be anyway.

15 All right. I will first going to address the
16 government's motion in *limine* that relates to Detective Daniel
17 Alessandrino. Alessandrino is a member of the New York Police
18 Department who was present at Teman's arrest in Florida. The
19 defense has subpoenaed Alessandrino for potential testimony but
20 has not indicated the subject matter of this testimony.

21 The government moves that, if called to testify by the
22 defense, Alessandrino's direct examination be limited to
23 relevant, nonhearsay topics. Teman responds that he may not
24 call Alessandrino at all, but if he does so, he will not
25 solicit hearsay testimony.

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1 On its face, the government's motion does no more than
2 ask the Court to enforce the Rules of Evidence. For whatever
3 value that may have, I can certainly grant that relief, which
4 is completely unobjectionable, insofar as the government's
5 motion does no more than ask the Court to do its job. For
6 future reference, it's not clear what purpose a motion like
7 this serves, but there it is. I remind counsel that any
8 testimony from any witness, whether Alessandrino or anyone
9 else, must comply with the Federal Rules of Evidence, it must
10 be relevant, it must comply with the hearsay rules, and it must
11 satisfy 403.

12 As to Alessandrino's testimony specifically, however,
13 there's nothing concrete at this point for the Court to
14 resolve. I am certainly not going to require the defense,
15 prior to trial, to disclose the subjects of any testimony that
16 Detective Alessandrino might be asked to give. The defense is
17 entitled to keep its strategy to itself. It is not apparent
18 whether Alessandrino would be in a position to offer admissible
19 testimony. The government suggests not, but it is premature to
20 decide. That may turn on developments during the trial. If
21 the defense does decide to call Alessandrino, the Court will
22 ask for a specific offer of proof from the defense so that the
23 Court can determine before he is called to the stand whether
24 there are proper bases for calling him to testify.

25 So, defense counsel, if you are going to go this

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1 route, please be prepared to give me, outside the presence of
2 the jury, a detailed proffer as to the purpose or purposes for
3 which you would be calling Alessandrino.

4 I'm now going to turn to the government's motion in
5 limine seeking to exclude evidence of specific, noncriminal
6 acts on Teman's part. The government asks that the Court
7 exclude any evidence of noncriminal acts or arguments by Teman
8 to the same effect, to suggest that because Teman complied with
9 the law or treated customers fairly on other occasions, he is
10 not guilty with respect to the crimes charged. As an example,
11 the government envisions that Teman might offer evidence that
12 he did not defraud customers other than Entities 1 through 4,
13 whose checks are at issue here. The government envisions that
14 Teman might argue that this makes it more likely that he did
15 not defraud Entities 1 through 4 either. In response, Teman
16 asks the Court to reserve judgment because the government's
17 motion is addressed to an abstraction, as the government has
18 not pointed to any specific evidence that it is seeking to
19 exclude. Teman promises that, to the extent he seeks to elicit
20 evidence of his law-abiding behavior, he would comply with the
21 Rules of Evidence governing character evidence.

22 Given the general level at which this issue has thus
23 far been briefed, Teman is right that there is nothing concrete
24 to resolve. The Court can do no more at this point than
25 identify the governing legal principles with which I expect

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1 counsel are already familiar. At a general level, the
2 government's characterization in its contention is right. It
3 is black letter law that "a defendant may not seek to establish
4 his innocence ... through proof of the absence of criminal acts
5 on specific occasions." Citing *United States v. Scarpa*, 897
6 F.2d 63, 70 (2d Cir. 1990); accord *United States v. Williams*,
7 205 F.3d 23, 34 (2d Cir. 2002). Although a criminal defendant
8 may introduce reputation or opinion testimony of a particular
9 character trait, under Federal Rule of Evidence 404(a)(2), such
10 character evidence may not take the form of evidence of
11 specific good acts or the lack of other bad acts. To allow
12 evidence of these specific noncriminal acts could "cause the
13 jury to make a forbidden propensity inference"; i.e., that a
14 defendant's prior good, honest acts suggest that he has a good,
15 honest character, therefore proving that he acted in accordance
16 with such character during the charged incidents. See *Jones v.*
17 *Stinson*, 229 F.3d 112, 120 (2d Cir. 2000). That inference is
18 prohibited by Rule 404(a)(1).

19 Consistent with this, the Second Circuit has time and
20 again upheld the exclusion of evidence of a defendant's lawful
21 acts when offered for this purpose. For example, in the *United*
22 *States v. Walker*, 191 F.3d 326, 336 (2d Cir. 1999), the circuit
23 upheld the exclusion of evidence that a defendant who was
24 charged with preparing false asylum applications had prepared
25 proper asylum applications in the past, because such evidence

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1 was being offered to disprove that he had acted with fraudulent
2 intent in the case at hand. Similarly, considering a defendant
3 charged with bribery in the *United States v. O'Connor*, 580 F.2d
4 38, 43 (2d Cir. 1978), the circuit held that evidence that the
5 defendant had not received bribes in the past should have been
6 excluded as improper character evidence.

7 That said, there are limited exceptions. Under
8 Rule 405(b), where the defendant's character is an essential
9 element of a charge or defense, such evidence may be admitted.
10 See *United States v. Doyle*, 130 F.3d 523, 542 (2d Cir. 1997).
11 That principle does not appear to be implicated in this case.
12 There are other cases that allow specific incidents of lawful
13 conduct to be received under a defensive application of
14 Rule 404(b), for example, to show that the conduct at issue was
15 part of a common scheme or plan. See *Jones*, 229 F.3d at 120;
16 see also *United States v. Aboumoussallem*, 726 F.2d 906, 911-12
17 (2d Cir. 1984).

18 I cannot do more here than recite those background
19 standards. Teman has not stated an intention to offer evidence
20 along these lines, and he well may not. In the event that
21 Teman intends to elicit proof of noncriminal acts on his part,
22 whether during the examination of government witnesses or as
23 part of a defense case, the Court will require beforehand an
24 offer of proof outside the presence of the jury. The
25 government will then be at liberty to exclude such evidence

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1 based on the lines of authority that I've just reviewed. I
2 therefore deny the government's motion as premature, without
3 prejudice to the government's right to move anew once a
4 situation involving concrete evidence implicating these
5 principles has crystallized.

6 I will next address the government's *in limine* seeking
7 a ruling permitting it to admit into evidence, pursuant to
8 Rule 404(b), the check stock seized from the defendant's office
9 space on July 3, 2019. I will also address at this point
10 Teman's related motion in limine to preclude the government
11 from offering as yet unnoticed Rule 404(b) evidence.

12 On July 3, 2019, Teman was arrested at his office in
13 Miami Beach, Florida. In connection with the arrest, law
14 enforcement officers seized a ream of "check stock" in plain view
15 in Teman's office. Check stock is specialty paper that an
16 individual can use to print checks. According to the
17 government, each page of check stock looks like an 8.5" x 11"
18 sheet of paper, except the top third is the outline of a check
19 and certain security features, such as a string of text
20 printed in the border of the check frame. The check stock
21 seized from Teman's office space contains security features
22 that appear to be different from the ones on the checks
23 deposited on March 28, 2019, and April 19, 2019, which are the
24 subject of the charges in this case. On December 31, 2019, the
25 government provided notice of its intent to introduce at trial,

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1 under Rule 404(b), the check stock that was seized from Teman's
2 office on July 3, 2019.

3 Rule 404(b)(1), of course, prohibits evidence of a
4 crime, wrong, or other act being used to show propensity, that
5 on a particular occasion the person acted in accordance with a
6 particular character trait. But Rule 404(b)(2) provides that
7 such evidence "may be admissible" for other purposes, such as
8 to prove "motive, opportunity, intent, preparation, plan,
9 knowledge, identity, absence of mistake, or lack of accident,"
10 provided the probative value of such evidence is not outweighed
11 by the risk of unfair prejudice. *See United States v. Ortiz*,
12 857 F.2d 900, 903 (2d Cir. 1988). Under Rule 404(b)(2), on
13 request by a defendant in a criminal case, the prosecutor must
14 provide reasonable notice of the general nature of any
15 Rule 404(b) evidence that the prosecutor intends to offer at
16 trial and "do so before trial -- or during trial if the court,
17 for good cause, excuses lack of pretrial notice."

18 The Second Circuit takes a "inclusionary approach" to
19 Rule 404(b) under which evidence of crimes, wrongs, and other
20 acts may be received "for any purpose other than to show a
21 defendant's criminal propensity, as long as the evidence is
22 relevant and satisfies the probative-prejudice balancing test
23 of Rule 403." *See, e.g., United States v. Carboni*, 204 F.3d
24 39, 44 (2d Cir. 2000); *see also United States v. Teague*, 93
25 F.3d 81, 84 (2d Cir. 1996), in which the circuit held that the

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1 state of mind required for the offense is a "proper purpose"
2 for admission of other crimes evidence under Rule 404(b).
3 Evidence offered for a permissible purpose, however, is
4 nevertheless inadmissible "if the other act or acts are not
5 sufficiently similar to the conduct at issue." United States
6 v. Gordon, 987 F.2d 902, 909 (2d Cir. 1993). Finally, for
7 evidence to be received under Rule 404(b), it must relate to an
8 issue in dispute. For example, in United States v. Scott, 677
9 F.3d 72, 83 (2d Cir. 2012), the circuit found an abuse in
10 discretion in admitting evidence under Rule 404(b) to show
11 identity where identity was not in dispute.

12 So turning to the check stock, the government moves
13 for a ruling permitting it to admit into evidence the check
14 stock seized from Teman's office on July 3, 2019, subject, of
15 course, to the check stock's authentication as such at trial.
16 The government argues that such evidence is admissible under
17 Rule 404(b) as evidence of Teman's motive, intent, plan,
18 identity, *modus operandi*, and the absence of mistake or lack of
19 accident with respect to the charged offenses.

20 The Court agrees and will receive such evidence at
21 trial, subject to its authentication. The blank check stock
22 seized at Teman's office is germane for reasons apart from
23 propensity. It shows his knowledge and familiarity with the
24 process of creating checks and in turn is germane to the
25 government's claim that he did so here by fabricating the

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1 allegedly unauthorized checks at issue. The average person may
2 not have blank check stock lying around his or her home or
3 office. Teman's possession of check stock, even if it is not
4 identical to the check stock allegedly used in this case, tends
5 to establish his facility and familiarity with material similar
6 to that used in the alleged crimes. The recovery of check
7 stock in Teman's office makes it more likely that Teman, as
8 opposed to someone else, created the specific checks charged in
9 the indictment. It also makes it more likely that Teman knew
10 what he was doing when, using such stock, he created allegedly
11 unauthorized checks with the features and terms those checks
12 contained. And once the check's probative value is recognized,
13 there is no offsetting basis to exclude them. Possession of
14 check stock is not inherently a bad act at all. It is just an
15 act. It does not inherently reflect ill or well on a person's
16 character. And Teman has not made any argument that
17 countervailing factors identified in Rule 403 favor exclusion
18 of the check stock. He's not identified any unfair prejudice,
19 confusion, or delay that may flow from receiving this check
20 stock into evidence.

21 Teman does offer two arguments in opposition to the
22 motion in limine.

23 First, he notes that the check stock was seized from
24 his office in July 2019, after the check deposits at issue,
25 which occurred in late March 2019 and mid-April 2019. But the

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1 gap between these events is just a few short months. Teman
2 offers no reason why this small passage of time would make his
3 possession of check stock in July 2019 completely nonprobative
4 of his familiarity with the use of check stock just a few
5 months earlier. Nor does he identify any supportive case law.
6 In the Court's judgment, Teman's possession of blank check
7 stock soon after the events at issue may fairly be argued by
8 the government as evidence of Teman's capacity to commit the
9 acts charged in the indictment. *See, for example, United*
10 *States v. DeFiore*, 720 F.2d 757, 764 (2d Cir. 1983), which held
11 other acts admissible under Rule 404(b) "even though they
12 antedated the limitations period." The passage of time instead
13 goes to the weight of the evidence. Defense counsel are free
14 to argue before the jury that the checks found in Teman's
15 office in July 2019 do not speak to his check-creation
16 capabilities three to four months earlier, and the government
17 is free to argue the opposite. That's why we have jurors.

18 Second, Teman argues that the possession of check
19 stock at an office is not inherently incriminating. Under
20 Rule 404(b), that point is a nonstarter. Under the rules,
21 prior acts need not be "bad acts" or inherently incriminating
22 acts to be admissible. They need not be *malum in se*. They
23 need only be relevant, offered for a proper purpose, and more
24 probative than unfairly prejudicial. And prior act evidence
25 that is on its face benign is frequently admitted at trial.

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1 For example, a defendant's access on a different date to the
2 scene of a crime, such as an office or an apartment or a car,
3 is frequently admitted under Rule 404(b) as proof of
4 opportunity or knowledge. Such evidence takes on an
5 incriminating quality only in conjunction with the other
6 evidence in the case, such as the case here. This point, too,
7 goes to the weight, not the admissibility, of the evidence.
8 Teman's counsel is at liberty to argue that possession of check
9 stock is no big deal and should not be treated as such here.

10 The Court therefore grants the government's motion to
11 receive the check stock seized from Teman's office on July 3,
12 2019, provided that the check stock is properly authenticated
13 at trial as having been seen there.

14 The Court does, however, request letters from counsel
15 as to a proper limiting instruction regarding the purposes for
16 which the jury may and may not consider the check stock seized
17 from Teman's office on July 3, 2019. Counsel are to confer
18 promptly on this point and to submit a joint letter by next
19 Wednesday, January 15, setting out what I expect will be their
20 agreement on the text of such an instruction or, failing that,
21 their separate views as to the text of such an instruction.

22 I turn now to Teman's motion in limine to preclude the
23 government from offering Rule 404(b) evidence at trial
24 concerning any matter not included in the government's notice
25 provided to Teman on December 31, 2019.

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1 As background, on December 31, 2019, the government
2 gave notice of its intent to introduce, under Rule 404(b), the
3 check stock I've just addressed. On January 2, 2020, counsel
4 for Teman emailed government counsel and requested notice of
5 any other Rule 404(b) evidence the government intends to
6 introduce at trial.

7 As noted, Rule 404(b) requires, on request, that a
8 prosecutor offering such evidence give reasonable notice of the
9 general nature of any such evidence and do so before trial --
10 or during trial if the Court, for good cause, excuses lack of
11 pretrial notice. The advisory committee notes to Rule 404(b)
12 state that "no specific time limits are stated in recognition
13 that what constitutes a reasonable request or disclosure will
14 depend largely on the circumstances of each case."

15 In seeking to exclude any as yet unnoticed 404(b)
16 evidence, Teman cites a 2011 decision in which my colleague,
17 Judge Pauley, excluded other act evidence disclosed
18 approximately one month before trial on the ground that the
19 government had failed to provide defendants with reasonable
20 notice. That is *United States v. Daugerdas*, 2011 WL 573587, at
21 page 2 (S.D.N.Y. Feb. 16, 2011). But that case is readily
22 distinguishable. It involves an unusually complicated
23 conspiracy by numerous defendants over the course of nearly a
24 decade to repeatedly commit complex tax fraud, largely through
25 the use of sophisticated fraudulent tax shelters. And prior to

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1 the ruling cited by Teman, Judge Pauley had warned the
2 government "repeatedly about the need to cabin its proof and to
3 provide advance disclosure of the transactions to be offered at
4 trial." *Id.*, in light of the massive universe of complex
5 business transactions spanning a decade that the defendants
6 otherwise would have had to prepare to defend at trial. Those
7 factors are not present here. It's not clear to the Court that
8 were the government to unearth additional 404(b) evidence,
9 Teman would, to anything like the degree presented in
10 *Daugerdas*, be hamstrung in preparing to meet it.

11 To be sure, the government's December 31, 2019, and
12 January 2, 2020, letters imply that the government does not
13 have any present intention to offer further Rule 404(b)
14 evidence beyond the check stock, but it's axiomatic that the
15 government's investigation is ongoing up to and through trial.
16 It is therefore possible that additional Rule 404(b) evidence
17 will come to light or take on new relevance before or during
18 trial. And Rule 404(b) allows the prosecution to disclose
19 other act evidence even as late as "during trial if the court,
20 for good cause, excuses lack of pretrial notice." Citing the
21 text of Rule 404(b).

22 The Court therefore denies defendant's motion to
23 preclude unnoticed 404(b) evidence categorically as premature.
24 If there is such an application, Teman will be at liberty to
25 seek to bar such evidence as untimely, and the Court would then

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1 determine, in the context of a particularized controversy,
2 whether the lack of prior notice was justified by good cause.
3 Without a concrete scenario before it, however, the government
4 cannot make an informed ruling. The Court expects the
5 government to provide prompt notice to defense counsel and the
6 Court of any additional 404(b) evidence, if any, as soon as it
7 develops an intention to offer such, so as to assure that the
8 issue of admissibility is thoughtfully and thoroughly
9 litigated.

10 Next, Teman has moved *in limine* to admit the Federal
11 Reserve Board's Federal Register Notice dated November 21,
12 2005. The notice relates to amendments to the fed's Regulation
13 CC that define "remotely created checks." Teman's position is
14 that the checks at issue in this case were valid "remotely
15 created checks (or RCCs) under the regulation. He seeks to
16 admit the Federal Register Notice as Defense Exhibit A to
17 assist the jury in concluding that that is so.

18 The Court denies the motion to receive the Federal
19 Register Notice for two independent reasons.

20 For one, Defense Exhibit A spectacularly fails the
21 test for admissibility under Rule 403. Under Rule 403, the
22 Court may exclude relevant evidence if its probative value is
23 substantially outweighed by a danger of confusing the issues or
24 misleading the jury. The Federal Register Notice has, at best,
25 limited probative value. The key factual issue the government

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1 seeks to prove at trial is not whether the checks Teman
2 deposited technically qualify or not as "remotely created
3 checks," that term does not appear in the superseding
4 indictment or, for that matter, the earlier indictment. It is
5 Teman, not the indictment, who seeks to inject the concept of
6 "remotely created checks" into the case. The indictment
7 alleges instead that Teman deposited the checks while
8 pretending to have authorization from the account holders to do
9 so, whereas in fact he had created and negotiated the checks
10 without such permission. The Federal Register Notice does not
11 tend to prove or disprove any fact of consequence to these
12 charges. The notice says nothing about whether the account
13 holders, the alleged -- who along with the banks were alleged
14 victims in this case, authorized the creation and negotiation
15 of the checks, and the notice says nothing whatsoever about
16 Teman's state of mind.

17 The Federal Register Notice is germane only insofar as
18 it might serve to educate the jury about the background fact
19 that there is such a thing as a remotely created check and that
20 the remote creation and presentation of such checks are not
21 itself unlawful acts. There may be value to the jury's being
22 informed of that. An old-fashioned juror may not know about
23 that, but that legal concept can easily be communicated to the
24 jury by other means, in particular by an instruction from the
25 Court, as I will explain in a few moments.

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1 On the flip side of the Rule 403 balance, the Federal
2 Register Notice would create unimaginable jury confusion. The
3 notice is an 18-page, single-spaced regulatory document. It
4 purports to define the term "remotely created check," and then
5 it discusses in expansive detail, among other things, the
6 regulation's administrative history. It also sets out in
7 numbing detail the fed's section-by-section legal analysis of
8 the regulation. Teman's notion that the search for truth in
9 this case would be furthered by inviting the 12 deliberating
10 jurors to wade through this technical, abstruse, academic, and
11 legalistic discussion in this document regarding RCCs is
12 ill-conceived. Such an exercise would promote extreme
13 confusion. It could easily lead the jury to think, wrongly,
14 that to reach a just verdict they are obliged to grasp the fine
15 points of this ponderous regulatory document. The capacity of
16 this document to produce confusion vastly outweighs any
17 marginal probative value that it might contain.

18 Second, Exhibit A is a legal document. It represents
19 and explains a point of federal law, a federal regulation. The
20 defense admits this in its motion. It notes that the exhibit
21 "remains federal law." I'm citing docket 60 at page 2. As
22 such, for the defense to thrust the Federal Register notice's
23 long text before the jury would be grossly to invade the
24 Court's province as the entity responsible for explicating law
25 for the jury. It is black letter law that "it is not for

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1 witnesses to instruct the jury as to applicable principles of
2 law, but rather for the judge." *See F.H. Krear and Co. v.*
3 *Nineteen Named Trustees*, 810 F.2d 1250, 1258 (2d Cir. 1987).
4 Teman's proposal to put before the jury the Federal Register
5 Notice, a legal document setting out and explicating in
6 tendentious detail a federal banking regulation, breaches this
7 foundational principle, whether the notice would be
8 authenticated by a witness or stipulation.

9 The Court therefore, under Rule 403, denies Teman's
10 motion to admit Defense Exhibit A.

11 However, the Court can imagine a circumstance in which
12 there would be good reason to educate the jury about the
13 central point that the defense presumably seeks to extract from
14 the Federal Reserve Notice, to wit, that a remotely created
15 check, created by a payee with the authorization of the payor
16 is a recognized and lawful instrument. The Court's present
17 instinct is that the best and proper way to convey this point
18 to the jury is by means of a brief instruction from the Court
19 to be given at an appropriate point during the trial. The
20 Court does not rule out, however, that an alternative
21 acceptable way to educate the jury about this background fact
22 would be by means of a brief stipulation. The Court directs
23 counsel to meet and confer forthwith on this issue with an eye
24 towards agreeing on the text of a jury instruction and/or a
25 joint stipulation.

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1 The Court directs the parties to submit by the close
2 of business Wednesday, January 15, a joint letter containing a
3 proposed jury instruction on this topic. If the parties cannot
4 agree on the terms of such a jury instruction, the letter is to
5 contain the parties' respective proposed instructions. Should
6 the parties agree on a factual stipulation to convey the
7 necessary information, the letter is to include that too.

8 The Court next addresses Teman's motion to exclude an
9 anguished typewritten note that Teman wrote to, *inter alia*, the
10 United States Attorney's Office. The note, which expresses
11 rage at numerous persons, was the subject of a telephone call
12 among the Court, counsel, and Teman on December 12, 2019, the
13 transcript of which the Court has ordered sealed. Teman argues
14 that the note is irrelevant and/or that any probative value it
15 has is outweighed by countervailing factors under Rule 403,
16 including the risk of unfair prejudice and confusion. The
17 government asks the Court to reserve ruling -- reserve on this
18 issue pending trial.

19 At this juncture, the Court is prepared only to say
20 that the vast majority of the note is plainly both irrelevant
21 and unfairly prejudicial. However, the government is correct
22 to observe that at points in the note Teman does address facts
23 and circumstances potentially relevant to the charges in this
24 case. These include reference to persons whose checks he is
25 alleged to have deposited without their authorization. Under

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1 these circumstances, the proper course is for the Court to
2 reserve judgment on Teman's motion, because it is conceivable
3 that a snippet or snippets within the letter could be properly
4 admitted or used during cross-examination of Teman, should he
5 testify. For avoidance of doubt, however, the government is
6 not to attempt to use any part of the note in any way without
7 the explicit prior approval of the Court. Should the
8 government determine that it wishes to pursue use of any
9 portion of the note for any purpose at trial, it is to notify
10 the Court and the defense forthwith, outside the presence of
11 the jury.

12 Next, I will address Teman's motion in limine to
13 preclude testimony from a person whom Teman depicts as a
14 government expert witness. The witness in question is Bank of
15 America vice president and senior investigator Karen
16 Finocchiaro. On January 6, 2020, the government gave notice to
17 the defense that it intended to call Finocchiaro to testify
18 about Bank of America's charge-back processes, as well as
19 information related to some of Teman's accounts at the bank.
20 Docket 61-1 at 1. As described by the government, a
21 charge-back is a process that occurs when a bank, having sent
22 money to another entity, seeks to have that money returned
23 because the bank suspects a fraudulent transaction. See docket
24 54 at 2. After the charge-back is initiated, the Federal
25 Reserve automatically transfers the money from the receiving

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1 entity back to the original bank. Id. The government expects
2 Finocchiaro to testify about Bank of America's procedures for
3 initiating and completing a charge-back and for responding to
4 charge-back requests from other banks. Docket 61-1 at 1.

5 Teman seeks to preclude Finocchiaro's testimony,
6 arguing that she is an expert and that the government failed to
7 provide the notice required for expert witnesses under Federal
8 Rule of Criminal Procedure 16(a)(1)(G). The government
9 responds that Finocchiaro's testimony is not that of an expert
10 and that it has no intention to elicit expert testimony from
11 her. It depicts her testimony as that of a lay fact witness
12 describing the operations of a component of her workplace. It
13 states that it provided notice to the defense about the content
14 of Finocchiaro's testimony "in an abundance of caution."

15 Docket 61-1. At the most, Finocchiaro -- the government argues
16 Finocchiaro's testimony could be categorized as lay opinion
17 testimony.

18 Under Federal Rule of Evidence 602, a witness' factual
19 testimony is admissible as long as the witness has personal
20 knowledge, subject, of course, to other rules like Rule 403.
21 See *United States v. Cuti*, 720 F.3d 453, 457 (2d Cir. 2013).
22 Opinion testimony of a lay witness is also admissible, but it
23 is limited under Rule 701 to opinions that are (1) rationally
24 based on the witness' perception; (2) helpful to understanding
25 the witness' testimony or a fact at issue; and (3) not based on

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1 scientific, technical, or other specialized knowledge. Expert
2 witnesses must meet additional requirements for their opinion
3 testimony to be admissible. Under Rule 702, such witnesses
4 must be qualified as a result of their knowledge, skill,
5 experience, training, or education, and their opinions must be
6 (1) helpful to the jury in understanding evidence or
7 determining a fact at issue, (2) be based on sufficient facts
8 or data, (3) be the product of reliable principles and methods,
9 and (4) reliably apply the principles and methods to the facts
10 of the case at hand. In short, expert opinion testimony must
11 be both relevant and reliable. See *Daubert v. Merrill Dow*
12 *Pharmaceuticals*, 509 U.S. 579, 590-91 (1993).

13 The first-order question here is whether Finocchiaro
14 is a fact witness or an opinion witness. Based on the
15 government's proffer of her anticipated testimony, she is
16 characterized properly as a fact witness. The government has
17 represented only that Finocchiaro will testify as to Bank of
18 America's charge-back processes and procedures, and while the
19 government is not explicit on this point, the Court assumes
20 that her personal knowledge of these procedures comes from her
21 experience as a Bank of America senior investigator. Assuming
22 that to be so, her account of the charge-back procedures at her
23 employer constitutes fact testimony from a fact witness. The
24 government has not provided any opinion that she would offer
25 about these procedures.

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1 The Second Circuit's decision in *United States v.*
2 *Marsh*, 568 F.App'x 15 (2d Cir. 2014), is apposite authority on
3 this point. There, a law enforcement agent who was trained in
4 retrieving text messages and data from cell phones testified in
5 a criminal trial during which he explained his training,
6 described how he extracted messages from phones in that case,
7 and conveyed the contents of the extracted messages. *Id.* At
8 17. The Second Circuit rejected a challenge that the agent's
9 testimony was improper expert opinion testimony from a
10 nonexpert. It explained that the agent "did not purport to
11 render an opinion based on the application of specialized
12 knowledge to a particular set of facts." *Id.* The same is true
13 here. The government's proffer does not foreshadow any opinion
14 testimony based on application of specialized knowledge to
15 facts.

16 Accordingly, assuming the government lays the proper
17 foundation as to why Finocchiaro has personal knowledge of the
18 matters about which she will testify, her testimony as
19 proffered is admissible fact testimony of a lay witness.
20 Teman's motion to exclude such testimony is therefore denied.

21 For avoidance of doubt, this ruling does not authorize
22 and should not embolden the government to elicit expert
23 testimony from Finocchiaro. The Court suspects that she will
24 testify solely based on personal knowledge about relevant
25 practices and procedures at her employer, Bank of America.

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1 Finally, I will turn to the government's most recent
2 motion, which asks the Court to preclude expert opinion
3 testimony that Teman proposes to offer. Teman's proposed
4 expert is J. Benjamin Davis. Davis is a lawyer whose practice
5 focuses on the financial services industry and who, according
6 to Teman, has had extensive experience with check negotiation
7 issues. See docket 74-1 at 1. On January 5, 2020, Teman gave
8 the government notice of Davis' anticipated testimony. See Id.
9 Teman states that Davis' testimony would include, inter alia,
10 descriptions of what constitutes a "remotely created check" and
11 what constitutes a "counterfeit check" and his opinions that
12 the checks were "valid RCC" and thus not counterfeit. See Id.
13 At 2-4.

14 The government seeks to preclude Davis' testimony for
15 three reasons: First, that it is irrelevant and will not be
16 helpful to the jury; second, that it improperly intrudes on the
17 province of the Court to give legal instruction to the jury;
18 and third, that his opinions are not the product of reliable
19 principles and methods, as required under Rule 702. Teman
20 disagrees on all fronts.

21 I will first address Davis' testimony related to RCCs,
22 followed by his testimony related to counterfeit checks.

23 First, as to whether Teman's checks constitute valid
24 RCCs, the Court will exclude this testimony. Davis' testimony
25 about RCCs is simply irrelevant. This issue mirrors the issue

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1 raised by the Federal Register Notice discussed earlier, and
2 which I am also excluding. As I reviewed in connection with
3 that notice, this case does not concern the technical
4 regulatory question of whether the checks meet the Federal
5 Reserve Board's definition of a valid RCC, as interpreted by
6 Davis or otherwise. This is a criminal case, and the issue on
7 Counts One through Four is whether the government has
8 established beyond a reasonable doubt that Teman is guilty of
9 bank fraud or wire fraud. On those counts, the government
10 alleges that Teman's fraudulent scheme consisted of
11 representing to the bank or banks at which he deposited the
12 checks that he had authorization from the owner of the account
13 on which the checks purported to be drawn to create those
14 checks and to deposit them into his own accounts. The
15 indictment alleges that Teman, in fact, lacked such
16 authorization. And as to Teman's fraudulent intent, the
17 indictment alleges that Teman acted with intent to defraud when
18 he pretended to have such authorization.

19 Davis' testimony about technical compliance with RCC
20 regulations has no bearing on either the act or the intent
21 requirement of these criminal statutes. If Teman had the
22 customer's authorization to create and deposit the checks, it
23 does not matter whether he did or did not technically comply
24 with the Federal Reserve requirements for an RCC.
25 Contrariwise, if Teman otherwise complied with the technical

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1 requirements for an RCC but did not have the customer's
2 authorization to create and deposit into his account a check
3 drawn on the customer's account, and yet intended to do so and
4 did so with the intent to defraud, no amount of compliance with
5 other technical regulatory specifications will serve as a
6 defense. Davis is not a fact witness. He is thus unqualified
7 and incompetent to discuss whether Teman's customers authorized
8 the checks in question, whether Teman knew or did not know
9 about such authorization or lack of authorization, and what
10 Teman's state of mind was when he negotiated the checks.
11 Davis' discussions of whether the checks are "valid" in some
12 technical sense does not bear on any issue at hand in this
13 criminal trial. Further, on the other side of the Rule 403
14 balance, Davis' commentary on these points, like the Federal
15 Reserve Notice, would serve to confuse the jury as to what the
16 issues they must decide are.

17 Finally, any testimony in this area by lawyer Davis
18 would invade the Court's province to instruct the jury as to
19 the law. As I have discussed with regard to the Federal
20 Reserve Notice, to the extent there is a value in explaining to
21 the jury that checks can lawfully be remotely created and
22 negotiated, the Court is open to doing so through an
23 instruction, and I've invited the parties to propose such an
24 instruction to the Court by Wednesday, January 15.

25 Second, as to whether Teman's checks qualify by some

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1 technical standard as "counterfeit," Davis' testimony is also
2 irrelevant. Davis proposes to testify that "a counterfeit
3 check is a check in which all features have been fabricated
4 (i.e., it is not from check stock that originally belonged to
5 the account holder), including the signature of an authorized
6 signer on the account." Docket 74-1 at 2. Davis would then
7 testify that, in his opinion, the checks do not meet this
8 definition and are thus not counterfeit. I will also exclude
9 this testimony. It is not relevant to any issue presented in
10 this criminal case. The allegation here, again, is that Teman
11 falsely represented that he had customer authorization to
12 create and negotiate the checks made out to him. Teman's guilt
13 or innocence here does not turn on whether every last feature
14 of a particular check was fabricated or only some parts.
15 Again, the allegation here is that Teman falsified and falsely
16 represented the fact of the account holder's authorization for
17 Teman to create and negotiate a check. If so, and if Teman
18 acted with intent to defraud in doing so, subject to the
19 jurisdictional elements, the elements of bank and wire fraud
20 will have been established. That is so even if hypothetically
21 some feature of the check stock was not fabricated by Teman.

22 Here's an illustration. If Teman, for example, had
23 taken preexisting, preprinted but blank checks of the account
24 holder and then, without authorization, filled out these checks
25 to himself and negotiated them, with intent to defraud, and if

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1 the jurisdictional elements were established, he would be
2 guilty of the offenses charged, notwithstanding the fact that,
3 say, the account holder's preprinted address appeared on the
4 checks. Davis' technical discussion of how the checks align
5 with his understanding of the word "counterfeit" does not
6 assist the jury in evaluating whether any element of bank or
7 wire fraud has been established. As with Davis' proposed
8 testimony about RCCs, his pontificating on this subject, too,
9 would serve only to confuse and distract the jury.

10 I will therefore preclude Davis from testifying on
11 this subject too.

12 There is, however, one caveat. Although this case is
13 not brought under a federal statute regarding counterfeit
14 checks, but instead, as relevant here under the bank and wire
15 fraud statutes, the government in the "to wit" clauses of
16 Counts One through Four of the indictment has chosen to use the
17 adjective "counterfeit" to describe the checks that Teman
18 deposited. From both the indictment and the government's
19 account in its filings in this case in its theory of liability,
20 it seems clear to the Court that, in context, the term
21 "counterfeit" is being used in the "to wit" clauses in the lay
22 sense to describe the fact of checks that were created without
23 the account holder's authorization. Insofar as the checks
24 purported to have been drawn by the account holder to the
25 payees in the sums indicated, but in fact had not been, they

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1 were "counterfeit." There's no indication, in the indictment
2 or otherwise, that by use of that adjective, the grand jury
3 intended some other technical meaning of counterfeit, such as
4 the one that Davis may have in mind, in which he contends that
5 literally every jot and tittle of the check must have been
6 fabricated by the defendant before it may be called
7 counterfeit.

8 I will, however, confirm with the government that the
9 use of the term "counterfeit" in the "to wit" clause of the
10 indictment was not based on the grand jury's having been
11 presented with a technical definition of the concept of
12 counterfeit along the lines that Davis proposes to use. If it
13 were unexpectedly to turn out that the indictment was returned
14 pursuant to such an instruction, I would then, of course, have
15 to reassess this ruling.

16 I'll also say this to defense counsel. I do not
17 expect this case to take an unexpected turn that would make
18 expert testimony in any of these technical points relevant.
19 But trials sometimes take unexpected courses. You are at
20 liberty, outside the presence of the jury, to make the argument
21 that some development at trial has created a justification for
22 expert testimony along the lines proffered.

23 And that concludes my ruling.

24 So, Mr. Bhatia, let's just go to that last point. I'm
25 not asking you to disclose the transcript of the grand jury,

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1 but I am trying to understand what was meant by the term
2 "counterfeit." Was the grand jury given a definition of the
3 term "counterfeit"?

4 MR. BHATIA: No, your Honor. I think what you
5 described in your ruling --

6 THE COURT: Speak into the mic a little bit more.

7 MR. BHATIA: When you described in your ruling the use
8 of counterfeit in the lay sense as sort of non-genuine or
9 non-authorized, I think that was the intended --

10 THE COURT: That was theory presented to the jury?

11 MR. BHATIA: That's right.

12 THE COURT: That's certainly consistent with the text
13 of the indictment in this case.

14 All right. That concludes, then, my ruling. We'll
15 take a ten-minute recess, and when we come back we'll continue.

16 (Recess)

17 THE COURT: Continuing on with the issues before us,
18 trial length, particularly given the rulings that I've made,
19 that may inform something about the length of the trial.

20 Government, do you have an estimate of the number --
21 how long the trial will be?

22 MR. BHATIA: Your Honor, I think in the three- to
23 four-day range, that will include cross.

24 THE COURT: When you make that estimate, are you
25 taking into account jury selection and jury arguments?

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1 MR. BHATIA: I think the government can close by the
2 end of the fourth day.

3 THE COURT: What assumption, if any, are you making
4 about a defense case when you make that estimate?

5 MR. BHATIA: That's just based on the government's
6 case.

7 THE COURT: That assumes no defense case?

8 MR. BHATIA: Yes.

9 THE COURT: Three to four days.

10 Defense, anything you want to share? I'm just trying
11 to think about this from a planning perspective, including what
12 to say to the venire.

13 MR. GELFAND: Obviously, without waiving any rights,
14 your Honor, I would anticipate an approximately one-day defense
15 case, if any.

16 THE COURT: So that's helpful. Putting all that
17 together, we're going to be starting on Tuesday, January 21. I
18 will sit that Friday. So that gives us four days the first
19 week. I suppose what I ought to say is the parties expect the
20 trial to be over between one and two weeks. Does that sound
21 like a fair estimate? Probably erring on the lower side, but
22 I'll find words to the venire along those lines. That sound
23 right?

24 MR. GELFAND: With us, your Honor.

25 MR. BHATIA: That sounds appropriate.

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1 THE COURT: All right. I don't think this will
2 matter, but I'm wide open the last week, save that if this is
3 still ongoing on Thursday, the 30th, I have a long-scheduled
4 speaking engagement in Midtown which would knock out an extra
5 long lunch period, but otherwise I have no blocks on my time,
6 at least through that day.

7 Mr. Smallman points out that I have a multi-defendant
8 case on Wednesday morning at 9 o'clock, but based on the
9 estimates I'm getting, it sounds as if there's a good chance
10 the jury will be out by then deliberating, in which case we can
11 accommodate both. We'll see. In any event, my chambers will
12 take stock of how this case is going with you late in the first
13 week and decide what, if any, implications it has for this
14 conference, but this takes precedence.

15 All right. As to my daily schedule, I expect counsel
16 and the defendant to be in their seats and ready to go at
17 9:00 a.m. sharp each day of the trial. Set aside for a moment
18 the very first day of the trial where the same will apply, the
19 ordinary schedule that I use when we have a jury is as follows:
20 Counsel are expected to be in their seats at 9:00 a.m. I tell
21 the jury they need to be ready to go and ready to be brought
22 out at 9:30, but we invite them to come as early as 8:45 when
23 we have breakfast available to them in the jury room, and that
24 often has the result of getting jurors here early.

25 Between 9:00 and 9:30 we use the time to work through

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1 issues that may come up during the trial day or, for that
2 matter, later in the trial. But at 9:30, as soon as the last
3 juror has arrived, we bring the jury out, and we sit till
4 5:00 p.m. I try to sit a full day to project to the jury that
5 we're respecting their time. We'll take a break in midmorning
6 and midafternoon, a comfort break, of ten to 15 minutes, and
7 we'll take a lunch break in the middle of the day. But
8 otherwise, we're going to work relentlessly from 9:30 to 5:00
9 with the jury.

10 After 5:00 p.m., you should expect to be here to the
11 extent that there may be issues for the next day or for a jury
12 charge, or whatnot, that I need to take up with you. While, if
13 necessary, of course, I will take sidebars, I prefer to avoid
14 doing so when I -- as much as possible. I prefer instead to
15 take up issues with you at the start of the day, at the end of
16 the day, and so I very much value getting letters or getting
17 previews from counsel at those points, either before the day
18 starts or afterwards, so that I can ideally resolve issues, not
19 in the crucible at the sidebar but with a little more
20 forethought and deliberation. It's already clear to me from
21 the extensive motion in limine briefing that both sides have
22 that sensibility. I was glad to see it, but I want to
23 encourage you to keep doing that, to keep raising issues so I
24 can have an opportunity to think on them and not be forced to
25 think fast. Avoiding sidebars also keeps us moving quickly.

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1 Juries hate it when we take long breaks doing that. I will if
2 necessary, but I'd like to minimize it.

3 On January 21 we will start at 9:00 a.m. Fair
4 warning, though, is that it will take some time to get us a
5 panel in all likelihood. The jury will need to -- the video
6 will need to get -- assuming the people who are sitting are
7 there for their first week, will need to get trained on jury
8 service. They'll need to watch the video, and they'll need to
9 be brought across the street. And I have it on good authority
10 that there's a high-profile case that might take precedence
11 over ours in terms of completing questionnaires, and whatnot.
12 So we will get started, but there might be some need for some
13 sort of break. I just don't know. Just fair warning. In any
14 event, because I won't see you between now and the 21st,
15 there's every chance a variety of housekeeping issues will pop
16 up, so be in your seats at 9:00 a.m. on the 21st.

17 I'm about to turn to voir dire. Any questions about
18 the schedule, though?

19 MR. BHATIA: No, your Honor.

20 MR. GELFAND: No, your Honor. One question, just
21 housekeeping question. To the extent that any evidentiary
22 objections do require more detail, would the Court like us to
23 request sidebar or just make the objection?

24 THE COURT: Try to make the objection in the first
25 instance just by reference to the --

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1 MR. GELFAND: Rules.

2 THE COURT: -- the rule of evidence, and I may prompt
3 you for elaboration if I need help. If there's something
4 fundamental, I'm open to your requesting a sidebar, but choose
5 wisely.

6 MR. GELFAND: Appreciate it. Thank you.

7 THE COURT: Very good. I should say -- this is
8 particularly relevant for the government since you go first --
9 you need to always have your next witness handy. The threat I
10 always make is if it's 4:45 and the last witness is done and
11 you don't have somebody else in the witness room, you'll be
12 taken as resting. So be sure there's always someone on the
13 on-deck circle.

14 MR. BHATIA: Understood.

15 THE COURT: Let's turn to voir dire. You've given me
16 the length of the trial that I will use, and I'll find words to
17 capture that. Given the length of the trial, I think we're OK
18 just going with two alternates. Anyone think otherwise? Seems
19 like a short enough trial that I don't need more.

20 MR. DIRUZZO: That's fine, Judge.

21 MR. BHATIA: That's fine.

22 THE COURT: All right. So as to jury selection -- and
23 Mr. Imperatore knows this, but for everyone's benefit -- I use
24 the struck panel method. That means what I will be doing is
25 having Mr. Smallman, in the first instance, identify 32

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1 prospective jurors numbered 1 through 32, and they will be --
2 the first eight will be in the first row of the jury box, nine
3 through 16 will be in the second row, and then 17 through 32
4 will be in the first few rows of the pews out here. Each juror
5 will retain their number. So if Juror 17 gets removed, the
6 successor juror will take the spot of No. 17 as opposed to
7 re-calibrating the rows. That makes your housekeeping and your
8 paperwork in mind easier.

9 I will direct a lengthy series of questions at them
10 aimed at determining whether there is any valid basis for a
11 for-cause challenge. And eventually, at the end of that
12 process, we'll have 32 people who have cleared for-cause
13 challenges. At that point we have a short one-page
14 biographical questionnaire -- I use the same one in every
15 case -- that elicits information about employment, family
16 members' employment, education, hobbies, reading habits, and so
17 forth. The final question, which counsel constantly tell me is
18 in some respects more revealing than many of the ones that come
19 before, asks if there's a famous person the juror admires and
20 briefly why. Sometimes that smokes out latent interests,
21 biases, and so forth.

22 In any event, you'll have the benefit of all that
23 information. I will then give you a very short break, but a
24 very short one, to determine how you intend to use your
25 strikes, and I'll then bring counsel into the robing room for

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1 the purpose of exercising your strikes.

2 This is important. This just gets to the mechanics.
3 Under the rules, with respect to the jury as opposed to
4 alternates, the defense has ten strikes and the government has
5 six. Those initial strikes are all to be directed to Nos. 1
6 through 28 of the 32. Those are the people eligible to be our
7 regular jurors. We will go, as per usual, in six rounds. The
8 first four of which the defense will have two strikes and then
9 the government will have one, and the last two that each side
10 will have one strike. The 12 People that remain will be our
11 jurors.

12 You need not go in sequence. You can strike No. 27
13 and then in the next round strike No. 1. There's no sequencing
14 requirement here. But if you waive a strike in a particular
15 round, you can't use it again. You can go back and use other
16 ones, but you can't use that one again. So, defense, in round
17 two, if you say we waive our two strikes, you can't get those
18 back even though your round three strikes remain.

19 You should not, though, direct those first strikes,
20 ten the defense, six for the government, at the alternate
21 candidates, No. 29 through 32. At the end of the exercise of
22 the strikes, as I said, the first 12 will be our jurors, if
23 somebody has waived a strike, the effect of that is, in effect,
24 to strike No. 28. So after we have figured out who the 12
25 jurors are, each of you will then have one strike to be used as

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1 against Nos. 29 through 32, and the two that survive that
2 process, or the first two that do, will be our alternates.

3 As is commonly the case in federal court, but just to
4 make the point clear, the Court alone does the questioning of
5 the jurors. There are no counsel questions.

6 Any questions about the mechanics of voir dire?

7 MR. BHATIA: No, your Honor.

8 MR. DIRUZZO: No, your Honor.

9 THE COURT: Who will be at each table during the
10 trial? Will it be the three people at each table who are here
11 now?

12 MR. BHATIA: From the government, yes, your Honor.
13 One moment.

14 (Counsel confer)

15 MR. BHATIA: Your Honor, we also have a case agent.
16 We have not made a decision yet about whether he will testify
17 as a witness at trial, but we may request that he sit at
18 counsel table.

19 THE COURT: I think, under the rule, he is
20 permitted to sit here whether or not he is -- I think it's
21 Rule 615. He's allowed to sit at the table as the embodiment
22 of the government's case, the government's corporate
23 representative. Just let Mr. Smallman -- or, rather, let my
24 law clerks know beforehand, because they're going to be
25 preparing a script for voir dire, and I need to know who's

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1 going to be there.

2 MR. BHATIA: We will.

3 MR. GELFAND: It will be --

4 THE COURT: Defense?

5 MR. GELFAND: It will be exactly as you say, your
6 Honor.

7 THE COURT: There's a point in voir dire where one by
8 one I ask you both each of you to rise and look at the jury,
9 look here and at the venire in the back. Listen closely to my
10 command for when you should get up. I don't want all three of
11 you getting up. I want it one by one, and I will choreograph
12 it that way.

13 Please -- and Mr. Smallman points out he will need to
14 know who's here for the appearance sheet, so tell him too.
15 Fair enough.

16 Do not say "hello" to the jury, please. It annoys
17 them to have people sucking up in that sort of a way, and I'm
18 asking you just to simply get up and let them see you. But
19 it's not an opportunity to wish them all well.

20 All right. For voir dire, I will need an alphabetical
21 list of all names that may come up in the case. These are not
22 just witnesses, but names that may come up. What I appreciate
23 is one list of human being names and one list of corporate
24 names, but make those separate and make them alphabetic. You
25 should get rid of the people who are named and present at the

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1 trial table. There's no need to include the lawyers or
2 Mr. Teman on that list. I'll ask the government to get that to
3 me after consultation with the defense. If you have other
4 names, please just add that.

5 All right. Let me briefly read to you just a very
6 short statement that I intend to give to the venire, as I do in
7 all cases, just so they have a general understanding of what
8 the case is about. I try to make this very stripped down.
9 It's not an opportunity to figure out what all the curlicues
10 are in the case, but really just to smoke out issues of bias in
11 case somebody has had a life experience that looks like this
12 case.

13 This is what I propose to read to the venire. When
14 I'm done reading this to you, I'll ask you if there are any
15 inaccuracies or any necessary edits:

16 "So you can understand the reason for the questions I
17 will be asking you shortly, I will now tell you briefly about
18 this case. I want you to understand that nothing I say today
19 regarding the description of the case is evidence. The
20 evidence that you will consider, if selected as a juror, will
21 come only from the trial testimony of witnesses, from the
22 reading of" -- sorry -- "from the trial testimony of witnesses
23 and from exhibits that are entered into evidence.

24 "As I have explained, this is a criminal case. It is
25 entitled United States of America v. Ari Teman. Mr. Teman has

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1 been charged with committing federal crimes in an indictment
2 returned by a grand jury sitting in this district. I will now
3 summarize the charges in this case in order to determine
4 whether anything about this case may make it inappropriate for
5 any of you to sit on the jury.

6 "In summary, the indictment charges Mr. Teman with
7 committing fraud by depositing into bank accounts that he
8 controlled checks drawn on other people's accounts but which
9 Mr. Teman was not authorized to deposit. It alleges that
10 Mr. Teman did this with two checks in approximately March 2019.
11 It alleges that Mr. Teman did this again between April and
12 June 2019, this time with 27 checks. In each instance, the
13 indictment alleges that Mr. Teman later used money that he had
14 and deposited for his personal benefit.

15 "In connection with each set of deposits, the
16 indictment charges Mr. Teman with three crimes: Bank fraud,
17 wire fraud, and aggravated identity theft. Mr. Teman denies
18 these charges.

19 "Now, let me stress that an indictment is not
20 evidence. It simply contains the charges against the
21 defendant, and no inference may be drawn against the defendant
22 from the existence of the indictment. You must always keep in
23 mind that the defendant is presumed innocent, that he has
24 entered a plea of not guilty to the charges against him, and
25 that the government must prove the charges in the indictment

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1 beyond a reasonable doubt."

2 So, counsel, tell me, any issues with that summary?

3 MR. DIRUZZO: Judge, I would just ask that there --
4 there are two things: One, the description of evidence, I
5 think it also needs to have an inclusion for stipulation of the
6 parties.

7 THE COURT: From trial testimony stipulations of the
8 parties?

9 MR. DIRUZZO: And documentary evidence.

10 THE COURT: It says exhibits, so that's fine.
11 Stipulation, good catch, yes.

12 MR. DIRUZZO: Then I believe you said Mr. Teman
13 deposited checks belonging to people, and I believe the alleged
14 victims are all entities.

15 THE COURT: OK. In other words, I should change
16 "people" to "companies" or "entities"? What's the right word?

17 MR. DIRUZZO: Companies, businesses.

18 MR. GELFAND: Companies or businesses. I don't know.
19 There's one other thing, your Honor, I may have misheard.

20 THE COURT: Sorry, one second. It says: "In summary,
21 the indictment charges Mr. Teman with committing fraud by
22 depositing into bank accounts that he controlled checks drawn
23 on other people's accounts ..." and you want "people" changed
24 to "businesses." I'm not sure, in the context here, people is
25 a shorthand for meaning other than Mr. Teman. But what would

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1 you propose I change?

2 MR. GELFAND: Companies.

3 MR. DIRUZZO: Companies.

4 THE COURT: On the accounts of -- I just want to make
5 sure it's clear these are companies, of course, that are not
6 his.

7 MR. DIRUZZO: Yes.

8 MR. GELFAND: "Customers of Mr. Teman's company"?

9 THE COURT: The business relationship, that's for you
10 all to litigate.

11 Government, what's your view?

12 MR. BHATIA: Your Honor, I think it may be fair to say
13 "on the accounts of others" to keep it most neutral, "checks of
14 others."

15 THE COURT: "On the accounts of others," that's fine.
16 I can say "checks drawn on the accounts of others." All right.
17 I'm not going to commit that I will use that language, but
18 that's certainly adequate. I may play with it a bit, but I
19 take the defense point not to use the word "people" when it's
20 actually corporate accounts.

21 MR. GELFAND: On an unrelated note, I might have
22 misheard this, your Honor, but the aggravated identity theft
23 counts are actually only associated with the March checks, and
24 I think the summary might have conflated that they were
25 associated with the --

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1 THE COURT: Yes, right.

2 MR. GELFAND: I don't remember the exact language, but
3 I just wanted to flag that for the Court.

4 THE COURT: Right. I have written "in connection with
5 each set of deposits, it charges him with three crimes," and
6 that's not correct. Why don't I say "in connection with these
7 deposits," that way it doesn't specify how the aggravated
8 identity --

9 MR. GELFAND: That's fine, your Honor.

10 THE COURT: Very good. With three -- it's irrelevant
11 to the jury in jury selection whether there are multiple
12 instances of separate crimes. I think it's enough to say three
13 crimes or sets of crimes, bank fraud, wire fraud, and
14 aggravated identity theft.

15 Are we OK with the description as edited?

16 MR. BHATIA: Yes, your Honor, I think with the change
17 for aggravated identity theft, it all sounds good.

18 THE COURT: Good.

19 MR. DIRUZZO: We're fine, Judge.

20 THE COURT: Thank you, counsel.

21 All right. Next issue is courtroom technology. I
22 know you're going to be meeting with Mr. Smallman for a
23 walk-through, but just so I understand, government, you're
24 going to be starting off. How are you going to be -- how
25 voluminous are the exhibits in this case, and how do you intend

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1 to make them known to the jury?

2 MR. BHATIA: Your Honor, I don't think the exhibits
3 are too voluminous in this case. What do you mean by how --

4 THE COURT: Are you going to use the ELMO? Are you
5 going to hand out hard copies? Are you going to --

6 MR. BHATIA: I think we're intending to use the
7 courtroom --

8 THE COURT: Computer system?

9 MR. BHATIA: -- computer system.

10 THE COURT: Not the ELMO at the podium?

11 MR. BHATIA: That's right.

12 THE COURT: All the more important, because it's a
13 balky courtroom and important that -- I guess this is probably
14 more for Mr. Magliocco than anyone in the courtroom -- you be
15 ready for prime time, so work with Mr. Smallman and be ready
16 beforehand.

17 MR. BHATIA: Yes.

18 THE COURT: Mr. Smallman points out that Mr. Magliocco
19 has ably assisted me, I think, in the Rivera trial? Rivera --
20 Polanco?

21 MR. MAGLIOCCO: Polanco trial.

22 THE COURT: Quite right. Defense, what about you?
23 What are your thoughts as to technology?

24 MR. GELFAND: Your Honor, our instinct, as of now, is
25 to rely primarily on the ELMO, as far as documentary exhibits.

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1 We also are going to make sure that we're fully situated with
2 the court's AV equipment so we can electronically display, as
3 well, using common software.

4 THE COURT: The issue would be for you, for example,
5 if there was something produced in discovery that you want to
6 show to the witness, just make sure that you have tested your
7 ability to use that. The jurors can't stand fumbling around
8 and long delays. So you will benefit as much as anyone by your
9 being crisp in the use of that.

10 MR. GELFAND: Absolutely, your Honor.

11 THE COURT: Very good. Anything else on courtroom
12 technology?

13 MR. BHATIA: Nothing, your Honor.

14 THE COURT: OK. Jury addresses. We have a -- it's
15 not present here right now, but we have a portable podium that
16 will be before the jury. Not that, but a portable one. It
17 will be right in front of the jury box. The important thing is
18 that it does not contain a microphone, so Mr. Smallman has a
19 handheld wireless mic which we usually lie down on the bar
20 before the jury right next to the podium, and that will pick up
21 everyone's voice. What it means is, though, you shouldn't be
22 straying far from the podium because you'll lose the mic. So
23 just as an FYI.

24 With respect to questioning of witnesses, you're to
25 question the witnesses from the podium back here. Please,

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1 except for presenting documents to the witness, you shouldn't
2 be questioning from the well of the courtroom. It's an
3 ancient, old courtroom. If you're far from the mic, it's hard
4 to be heard. You'll surely hear me from time to time asking
5 people to keep their voices up.

6 All right. 3,500 material. Has the government
7 provided 3,500 to the defense; if so, when does it intend to do
8 so?

9 MR. BHATIA: Your Honor, we have not produced 3,500,
10 but we plan to do it in the first half of next week.

11 THE COURT: All right. I can't order you to do it on
12 a particular date, but can you commit to a specific date so the
13 defense knows?

14 MR. BHATIA: We can produce it by Wednesday of next
15 week.

16 THE COURT: How voluminous is the 3,500 material?

17 MR. BHATIA: I don't expect it to be very voluminous,
18 certainly not beyond what has already been produced as
19 discovery.

20 THE COURT: Not beyond what?

21 MR. BHATIA: Not beyond what has been produced in
22 discovery.

23 THE COURT: I don't know what that means.

24 MR. BHATIA: Some of the 3,500 has already been
25 produced as Rule 16 discovery.

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1 THE COURT: Right.

2 MR. BHATIA: It may not be new. I don't expect it to
3 be voluminous, though.

4 THE COURT: All right. Please, when you get the
5 binders -- or binder or binders, please get two sets of that to
6 my chambers as well. I will often flip through it beforehand
7 just to get a sense of what's coming, and it's important for me
8 and my law clerk each to have a set of that.

9 MR. BHATIA: We will.

10 THE COURT: All right. Government, also, just in the
11 interest of enabling the defense to prepare, it is my practice
12 to ask you each day who the next witnesses are likely to be.
13 Obviously, in the event there's a good reason, you may need to
14 shake it up, but nobody benefits by mystification. So I will
15 expect you to give the defense a sense of who your next
16 witnesses are at the end of each day.

17 MR. BHATIA: Understood.

18 THE COURT: Obviously, you can do so beforehand,
19 before even that, all the better. That also allows me to
20 prepare for the next day's testimony.

21 To the extent that you're updating 3,500 material, per
22 usual, I expect that I would get hand delivered to us whatever
23 additional three-hole punched supplements there are as they get
24 generated. Usually counsel tend to give it to my chambers at
25 the end of the court day or at the beginning of the next court

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1 day.

2 Government, I would welcome a pair of exhibit binders
3 as well. Obviously, you're at liberty to update those. I
4 assume that you can get those to me the Friday before trial,
5 the 17th.

6 MR. BHATIA: We will.

7 THE COURT: And, obviously, the same to the defense.

8 All right. I have benefited by the government's
9 preparation of an exhibit list and your updating it on a daily
10 basis to annotate what has been received in evidence, that way
11 it makes sure that both tables in the court are on the same
12 page and have no doubt of what's been received in evidence. I
13 ask you to kindly prepare that. I'm rather sure we did that in
14 the Polanco trial.

15 Verdict form. This is about as straightforward as it
16 gets, but, defense, do you have any issues with -- I may make
17 some nonsubstantive changes, but any issues with the verdict
18 form as provided by the government?

19 MR. GELFAND: Not at first glance. The only question,
20 depending on what ultimately turns on disputes at trial, is
21 whether we would request any special interrogatories.

22 THE COURT: Right. There's no sentencing factor here.

23 MR. GELFAND: Correct.

24 THE COURT: What would the purpose be of a special
25 interrogatory?

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1 MR. GELFAND: I don't anticipate there will be any. I
2 just wanted to get a carve-out theoretical exception.

3 THE COURT: If you come up with some issue with the
4 verdict form, let me know as soon as possible.

5 MR. GELFAND: Absolutely.

6 THE COURT: Almost done here. Plea offers. This
7 being our last conference, I need to put on the table and raise
8 whether any plea offers have been made to the defendant and to
9 confirm that they were communicated to him. For the benefit,
10 in particular, of Mr. Teman, the reason courts do this is not
11 to pry but, rather, because from time to time one gets
12 post-trial complaints by defendants that plea offers were never
13 communicated to them. Sometimes these happen years after the
14 fact. It's important that a Court inquire at this stage
15 whether there was any such thing, just so that there's a clear
16 understanding from everybody about what happened as to the plea
17 process.

18 Government, can you put on the table what, if any,
19 plea offers have been made in this case.

20 MR. BHATIA: Your Honor, no formal plea offers have
21 been made in this case.

22 THE COURT: I take it there must have been some
23 informal discussion, or not even that?

24 MR. BHATIA: We have had informal discussion at
25 different stages of the case, but there hasn't been a formal

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1 offer.

2 THE COURT: All right. Mr. Gelfand, is that correct?

3 MR. GELFAND: Yes, your Honor, it is. What I would
4 note, for the record, is that Mr. Teman has consistently
5 expressed his intention to proceed to trial and his lack of
6 interest in any sort of plea. As a practical matter,
7 government counsel being government counsel and defense counsel
8 being defense counsel, we have engaged in just some very
9 general dialogue over the course of this case, nothing that has
10 materialized in an offer, either by the government or a request
11 by the defense.

12 THE COURT: I'm going to ask Mr. Teman just to confirm
13 that's his understanding.

14 Mr. Teman, is it correct that you are unaware of any
15 plea offer, any formal plea offer, having been made to you?

16 THE DEFENDANT: Correct, your Honor.

17 THE COURT: Any counsel believe I need to inquire
18 further about this subject?

19 MR. BHATIA: No, your Honor.

20 MR. GELFAND: No, your Honor.

21 THE COURT: All right. There's a final matter
22 relating to the grand jury which I'll take up in a moment, but
23 before that, does anyone have anything else relating to the
24 trial that they want to raise?

25 MR. BHATIA: No, your Honor.

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1 MR. DIRUZZO: Your Honor, before we get into the grand
2 jury portion, early this morning, earlier this morning, counsel
3 for the government provided us with a letter indicating they
4 have effectively changed the alleged victims for the aggravated
5 identity counts. We view this, given the government's past
6 representations -- and I'm sorry I don't have a copy, but I
7 literally got the email with the letter while we were in the
8 courthouse, your Honor, so I don't have a copy to provide the
9 Court -- but as a result of the government's total change in
10 its position as to who the alleged victims of the agg. ID
11 counts are, we're taking the view that the government now has
12 to have *Brady* information because the government has made
13 representations in the past that are now totally inconsistent.
14 And we believe that, at a minimum, the information and the
15 testimony before the grand jury that resulted in the previous
16 indictment and previous superseding indictment will be *Brady*,
17 some form of *Brady* material.

18 THE COURT: Let's unpack this. Who are you told is
19 the victim of -- is Entity 3, the -- Count Five charges
20 aggravated identity theft for March 2019. It says that Teman
21 deposited a check using the personal identifying information of
22 an individual associated with Entity 3. Who's Entity 3?

23 MR. DIRUZZO: Your Honor, unfortunately, given that it
24 just came to me via email, the only way I'd be able to answer
25 that would be to look on my phone, which I have turned off, and

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1 I don't want to offend the Court.

2 THE COURT: You're not offending the Court. I'm just
3 trying -- you're telling me there's been a switch, so I'm
4 trying to figure out who it was earlier and who it is now.

5 MR. GELFAND: Your Honor, I think this may help. The
6 government, by letter this morning, indicated that the entity
7 referenced in Count Five is Mercer, whatever the formal name
8 is.

9 THE COURT: Right.

10 MR. GELFAND: And then the entity referenced in Count
11 Six is Coney.

12 THE COURT: Count Six refers to Entity 4.

13 MR. GELFAND: Correct.

14 THE COURT: Spell Coney.

15 MR. GELFAND: Coney, C-o-n-e-y.

16 THE COURT: And those same counts appeared in the
17 preceding indictment, correct?

18 MR. GELFAND: Correct, your Honor.

19 THE COURT: Are you saying that you were told that
20 either Entity 3 or 4 were different than Mercer and Coney,
21 respectively, earlier?

22 MR. GELFAND: No, the entities were not different.
23 What was different -- I can -- just for the Court's benefit, by
24 email dated November 12 of 2019, government counsel,
25 Mr. Gutwillig, in an email to me, cc'ing Mr. DiRuzzo, stated --

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1 I don't know if the Court's OK with me naming the alleged
2 victims.

3 THE COURT: Sorry?

4 MR. GELFAND: Is the Court OK with me naming the
5 alleged victims?

6 THE COURT: Sure. There is a *Brady* issue here.

7 MR. GELFAND: Stating "the victims are, one, for Count
8 Three, which was the prior enumeration, Peter Rebenwurvel,
9 R-e-b-e-n-w-u-r-v-e-l, and for Count Four, Gina, G-i-n-a, Hom,
10 H-o-m, and then --

11 THE COURT: Meaning that Rebenwurvel was associated
12 with Mercer, and Hom was associated with Coney?

13 MR. GELFAND: Rebenwurvel actually related to how
14 Count Three was charged previously as Coney and Hom was Mercer.

15 THE COURT: I'm confused.

16 MR. GELFAND: Rebenwurvel is associated --

17 THE COURT: Sorry, the original Count Three, is that
18 the current Count Five, or is it the current --

19 MR. GELFAND: The original Count Three is the current
20 Count Six.

21 THE COURT: So the original Count Three --

22 MR. BHATIA: Your Honor, if I might offer some
23 clarity?

24 THE COURT: That would be great.

25 MR. BHATIA: The original Count Three -- sorry, the

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1 first superseding Count Three is now Count Five. And for Count
2 Three previously and now Count Five, the corporate entity is
3 Coney Realty.

4 THE COURT: Count Three and Five. So what defense
5 counsel said was wrong earlier that Mercer is --

6 MR. BHATIA: I think they just flipped.

7 THE COURT: I'm sorry. You need to speak up.

8 MR. BHATIA: Yes, your Honor. It was incorrect.

9 THE COURT: Let me see if I've got this right. I'm
10 going to ask you, Mr. Gelfand, just to listen closely to what
11 my colloquy with government counsel is. This may clear things
12 up. It may be that it's utterly unnecessary to involve me
13 because there hasn't apparently been a dialogue with counsel,
14 but let's see if we can work this out.

15 Count Five, government counsel, identifies Entity 3.
16 Who is Entity 3?

17 MR. BHATIA: Entity 3 is Five -- well, it's 518
18 West 204th LLC, which is operated by -- I say "operated" in the
19 lay sense -- associated with or operated by Coney Realty.

20 THE COURT: All right. So Count Five, Entity 3, is
21 Coney in the vernacular, and Count Six, Entity 4, is who?

22 MR. BHATIA: It's Crystal Real Estate. It's actually
23 18 Mercer Equity, but it's really sort of operated by Crystal
24 Real Estate.

25 THE COURT: Is there a Mercer involved? So that's

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1 Mercer in that sense?

2 MR. BHATIA: The corporate entity is 18 Mercer Equity,
3 I think, Inc. Or LLC, and it's operated by Crystal Real Estate.

4 THE COURT: All right. What was the predecessor count
5 to the current Count Five?

6 MR. BHATIA: Count Three.

7 THE COURT: What was the predecessor count to the
8 current Count Six?

9 MR. BHATIA: Count Four.

10 THE COURT: All right. So focusing on the current
11 Count Five where it's this 518 West 204th LLC operated by
12 Coney, was that the same entity that Mr. Gutwillig indicated
13 was the victim of count -- of the earlier Count Three?

14 MR. BHATIA: I can clarify the victim question. The
15 corporate entities for the checks that were drawn were the
16 same.

17 THE COURT: Right.

18 MR. BHATIA: Previously Coney, now Coney.

19 THE COURT: Right.

20 MR. BHATIA: Previously, the government had agreed
21 that the victim of identity theft, the individual, the person,
22 was Peter Rebenwurvel. The government disclosed this morning
23 in a letter providing particulars that the victim -- the
24 victim, persons whose means of identification have been taken,
25 are three individuals: Peter Rebenwurvel -- let me make sure I

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1 say it right from my letter -- Michael Haas.

2 THE COURT: Michael, spell the last name.

3 MR. BHATIA: H-a-a-s.

4 THE COURT: Right.

5 MR. BHATIA: And Ephraim Nuremberg. Actually, your
6 Honor, I now realize the source of confusion here. In the
7 indictment, what I described was correct. I believe in the
8 bill of particulars today, we flipped the entities. That's the
9 source of confusion.

10 THE COURT: The source of confusion is that your
11 letter today is wrong?

12 MR. BHATIA: The letter flips Count Five and Count
13 Six. We'll give them a new letter.

14 THE COURT: All right. Once you correct your
15 letter --

16 MR. BHATIA: That's right.

17 THE COURT: -- will there be symmetry between your
18 disclosures as to the earlier Count Three and the current Count
19 Five?

20 MR. BHATIA: No.

21 THE COURT: What's changed?

22 MR. BHATIA: Previously the government had agreed with
23 defense counsel -- the government and defense counsel had
24 agreed to file a stipulation providing the particulars. I
25 think we've now had a sense that a letter providing those

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1 particulars is sufficient. But previously we had agreed that
2 the victim of the identity theft count for Coney was Peter
3 Rebenwurvel.

4 THE COURT: Right.

5 MR. BHATIA: We now believe that the victims were
6 three individuals. So the first one was relating to the first
7 superseding indictment, and as to the second superseding
8 indictment, we're alleging that it's these three individuals.

9 THE COURT: That's all fine and good, but the
10 indictment doesn't say that. Count Five of the superseder uses
11 singular. It says an individual associated with Entity 3. Who
12 did the grand jury -- what was the charge to the grand jury as
13 to who that individual was? We can't have a shifting target.
14 That reflects a charge by the grand jury. That's what the
15 defendant will be tried on. Who's that individual?

16 MR. BHATIA: Your Honor --

17 THE COURT: Can't just say three people if you say "an
18 individual."

19 MR. BHATIA: I just want to tread lightly, knowing
20 that I'm in the domain of the grand jury.

21 THE COURT: But, look, sorry, but the grand jury
22 formulates the charges. The government doesn't add content to
23 and change the charges. And for better or worse, you went to
24 the grand jury and said "an individual." Who is that
25 individual?

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1 MR. BHATIA: May I have a moment, your Honor?

2 THE COURT: Yes.

3 (Counsel confer)

4 MR. BHATIA: Thank you, your Honor.

5 The grand jury was presented with the fact that
6 individuals associated with the company had not authorized the
7 check, and signers on the account had not authorized the check.

8 THE COURT: Right.

9 MR. BHATIA: The government has learned that the three
10 signers on the account, the signers on the two victim accounts,
11 were the people identified in the particulars here.

12 THE COURT: Right. I'm not stating you don't have a
13 factual basis. The question is what was to be presented to the
14 jury here? It needs to track the indictment returned by the
15 grand jury. So the question is what is meant when you say "an
16 individual"? Was that a somewhat inexact way of saying three
17 individuals?

18 MR. BHATIA: I think it was an inexact way of saying
19 three individuals.

20 THE COURT: What was presented to the grand jury? Was
21 the grand jury presented with the evidence substantiating that
22 the personal identification of three individuals was --

23 MR. BHATIA: My recollection is that the grand jury
24 was not presented with a single name. It was not presented
25 with a victim. It was presented with --

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1 THE COURT: All three?

2 MR. BHATIA: It was -- I shouldn't say it was even
3 presented all three. I believe it was presented with testimony
4 that no one associated with the company, as far as the
5 investigation has revealed, authorized the checks.

6 THE COURT: Right. But that goes to the fraud counts.
7 Here the issue is the personal identifying information of an
8 individual. The challenge for you here is that presumably
9 there was something before the grand jury that substantiates
10 that allegation. It doesn't sound as if there was an attempt
11 made to challenge the grand jury to any particular individual.
12 It sounds as if you're representing to me that the grand jury
13 had a basis for concluding that three separate people's
14 personal identification information was used on the check that
15 Teman deposited. Is that correct?

16 MR. BHATIA: The grand jury was not given a number of
17 authorized signers on the account. So the grand jury was not
18 presented with a name or two names or three names. But the
19 fact that, based on the investigation, whoever the persons may
20 be, person or persons may be, did not authorize the account --
21 or did not authorize the checks. So the grand jury was not
22 presented with one name or two names or three names.

23 THE COURT: All right. They were presented, rather,
24 with the idea that the identifying information of people
25 associated with the entity was used?

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1 MR. BHATIA: That's correct.

2 THE COURT: Not the specifics of that?

3 MR. BHATIA: I think that's a more succinct way of
4 saying that.

5 THE COURT: Be that as it may, there's no obligation
6 that that's the means by which you present the case to the
7 grand jury. The issue is suppose the jury here, six of them
8 think that Rebenwurvel's personal identifying information was
9 used and six of them think that it's Hom or Haas and six think
10 it's Nuremberg, and there's no 12 that agree on any one person.
11 What do you do then?

12 MR. BHATIA: Your Honor, we are in tune to the
13 unanimity issues here. And, actually, I think we are intending
14 to submit an instruction regarding other parts of unanimity
15 involved in this case. Here, as I understand it, in terms of
16 the offense, the means of identification needs to identify
17 people. So I believe as the -- I believe there's not going to
18 be a unanimity requirement here, as long as the jury finds that
19 the means of identification were capable of identifying
20 specific people.

21 THE COURT: Well, let me ask you, just to make this
22 easier, did all these rise or fall together? I mean, is it the
23 same check that uses all three people's names?

24 MR. BHATIA: It's a check with sort of a squiggle
25 mark, and that is -- that's using the identification of one of

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1 these three people.

2 THE COURT: Here's the sentence in the indictment:

3 "Teman deposited a check using the personal identifying
4 information of an individual associated with Entity 3." I
5 think you're saying to me that that check, therefore, must have
6 the personal identifying information of all three of the people
7 you are mentioning. Is that what you're saying?

8 MR. BHATIA: The check, yes, could identify those
9 three people, but it does not have the personal identification
10 information of each person.

11 THE COURT: I'm totally confused.

12 (Counsel confer)

13 MR. BHATIA: Your Honor, I can maybe provide some
14 clarity. Let me take Count Five, for example. The government
15 is alleging that the defendant deposited a check designed to
16 look as if it came from Coney Realty, and on that check has the
17 name of Coney Realty at the top, has the corporate entity and
18 then Coney entity, and it has the routing number associated
19 with a particular bank account, the account number, and it has
20 a sign, a signature, on it. The government has learned that
21 there are three authorized signers for that Coney Realty
22 account, and so the government's alleging that the defendant
23 used the means of identification of one of those three people
24 on the check.

25 THE COURT: I see. I'm sorry. So when you say he

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1 deposited a check, the locution isn't clear to me whether that
2 means that the personal identifying information is literally
3 physically on the check or it was used in connection with a
4 deposit by some means other than writing it on the check. Just
5 help me with that. What does he do?

6 MR. BHATIA: What I mean is that by including the
7 signature there, along with the routing number and the name of
8 the account, the defendant is essentially seeking to mimic one
9 of those people to demonstrate, as the government believes,
10 fraudulently, that he had authorization to deposit the checks.
11 So the signature is co-opting the means of identification of
12 those three people.

13 THE COURT: Let me get this right. You're not saying
14 that he, separate from what appears on the check, does
15 something with someone's identifying information. He doesn't
16 hold up a fake driver's license or something like that. The
17 entirety of the allegation about the personally identifying
18 information of this individual is physically contained on the
19 physical check itself, is that correct?

20 MR. BHATIA: That's right.

21 THE COURT: All right. Does it have the name of any
22 of these people on that check in any place?

23 MR. BHATIA: The check does not.

24 THE COURT: Does it have the signature or purported
25 signature of any of those people on the check?

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1 MR. BHATIA: It has a purported signature on that.

2 THE COURT: To the extent it's legible, what does it
3 say?

4 MR. BHATIA: It doesn't -- the signature at least -- I
5 don't think it appears to be one of those three people.

6 THE COURT: All right. Is there any other identifying
7 information -- name, rank, serial number, social security
8 number, date of birth, DNA? Is there something about addresses
9 or something about any of those people that appears on the
10 check?

11 MR. BHATIA: No, your Honor.

12 THE COURT: So you have a signature. If you read
13 aloud the word on the signature, is the signature the name of
14 the corporate entity or the name of the individual?

15 MR. BHATIA: I don't think you could read aloud the
16 signature.

17 THE COURT: So how does this count get to the jury?
18 In other words, what's the means of identification of another
19 person here? I understand that you're saying that he pretends
20 to be the corporate entity or pretends to be a representative
21 of the corporate entity, and that's all good and fine as a mean
22 and method of the wire and bank fraud. Got you loud and clear
23 on that. But aggravated identity theft, I'm struggling with
24 that a bit. Walk me through that.

25 MR. BHATIA: Your Honor, I believe under the statute

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1 it's the means of identification that together -- or I think
2 it's something to the effect of together or in combination with
3 can identify another person. Here, using the corporate account
4 and the account number and the name plus the signature could
5 lead someone at the bank to conclude, for example, Peter
6 Rebenwurvel must have signed this check. So we believe that
7 that is the valid basis for an aggravated identity theft count.

8 THE COURT: Whose identity is being misused? Is it
9 Peter's? Is it the company? Whose identity is being stolen
10 here? Is it the individual associated with the corporate
11 entity or is it the corporate entity?

12 MR. BHATIA: It's the authorized signers for that
13 account.

14 THE COURT: Let's go to the elements. Let's put aside
15 the "to wit" clause for a moment.

16 He knowingly transferred, possessed, and used,
17 according to the indictment, without lawful authority a means
18 of identification of another person. What means of
19 identification are connoted by Count Five?

20 MR. BHATIA: The signature is the -- I believe that
21 the signature taken in combination with the account number and
22 the name is the means of identification of another person.

23 THE COURT: So any defendant who forges a check on
24 somebody else's account is committing aggravated identity
25 theft, even if they don't present any evidence/statement saying

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1 I'm that person? It follows, right, just if you sign as
2 somebody, you are using a means of identification, right?

3 MR. BHATIA: I believe it's right, your Honor, that --
4 check fraud is sort of the prototypical example of aggravated
5 identity theft when we've taken a look at the legislative
6 history on this point. So for that reason, we think --

7 THE COURT: Right, check fraud is usually -- in the
8 classic aggravated identity theft. It's more than simply
9 boldly going into a bank and depositing it into Judge
10 Engelmayer's account a check written out to Judge Judy. It's
11 more that I would present -- it's usually the identification
12 substantiating the other identity that would be used, and
13 that's usually -- not that that's the only way, but that's
14 usually the way in which those cases manifest. What you're
15 saying is the deposit into person A's account of a check made
16 out to person B, something like that is in and of itself,
17 without more, aggravated identity theft.

18 I can't resolve that here and now, but it does seem to
19 me this is not so much a *Brady* issue, as it's been explicating,
20 it's an issue of whether or not the evidence that you are
21 committing to me is really the only evidence of aggravated
22 identity theft, what's contained on the check, meets the legal
23 requirements for that count. I don't think -- defense counsel,
24 you've raised a valid issue, but I think you've mispackaged it.
25 It's not a *Brady* issue. The government's explained to me now

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1 that, in effect, whereas they said one, they're saying three
2 now because it could have been any of those people who are
3 authorized signers; and therefore, the presentation of the
4 check, in the government's theory, is a form of theft of any
5 authorized signer. I don't think that's a Brady issue. It's
6 really a sufficiency issue of whether or not the means of
7 commission here satisfied aggravated identity theft.

8 I think the right way to go here is by your taking a
9 close internal look at this question. There's no value in our
10 going to the jury -- if, ultimately, the conduct you've
11 described can't get to the jury, there's no point in starting
12 there. So why don't you dig into it and get me a letter by
13 Wednesday that explains what evidence will be used to show the
14 crime of aggravated identity theft and what the law is as to
15 whether or not it can get to a jury.

16 MR. BHATIA: Your Honor, we'll put in that letter, and
17 I'll make two -- I'll just say two things: One, we have
18 conferred internally within the office, including with our
19 appeals unit, about this issue. It's something that we spoke
20 to them about. Of course we'll put in the letter.

21 The second is, of course, the caveat that I have to
22 make, which is that our investigation continues, and we'll
23 continue our investigation up until and through trial.

24 THE COURT: That's all fine and good, but you've got
25 charges here right now. And I understand that if you can

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1 develop evidence that he walked into the bank and presented the
2 social security card for Peter Rebenwurvel, the case looks
3 different. But on the assumption that this crime is over and
4 done and is limited -- the evidence is limited to the check
5 itself on which, I take it, handwriting that is not legible as
6 any particular person's but is treated by the bank as some
7 authorized signatory of the corporate account holder, the
8 question is whether that alone is aggravated identity --

9 MR. BHATIA: Understood.

10 THE COURT: -- and what we do with (a) the inability
11 to argue that it's any particular person's identity, but (b)
12 even if it was just one signatory, whether simply the
13 presentation of a check, as much as that might be bank fraud
14 and wire fraud, is also aggravated identity theft without more?
15 I think I need a letter along those lines. Why don't I give
16 you till Wednesday.

17 Defense, if you want to respond, you've got till
18 Friday. When I meet with you on Tuesday morning, assuming the
19 government is still pursuing that count and assuming the
20 defense is still arguing that the claim is unsustainable, I'll
21 hear from you then. I would very rarely dismiss a count before
22 we started the trial, but the law does permit, where the
23 government gives what it acknowledges to be a thorough going
24 proffer of all the evidence, it does give the Court authority
25 to do that. I'm reluctant to do it other than that, but if

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1 you're literally committing to me that the only relevant
2 evidence is going to be the check itself, there is a basis on
3 which the Court can legally make that determination. So
4 please, please take a close look at it.

5 But, look, Mr. DiRuzzo, I think you're the one who
6 raised this issue. I don't think it's really a Brady issue.
7 You now understand why the government said what it said.

8 MR. DIRUZZO: I do. But, obviously, I don't have the
9 benefit of what was said before the grand jury. I could very
10 well imagine if someone testified initially that it was Peter
11 Rebenwurvel and then now someone's testifying that it's not
12 Peter but it's Peter and maybe other people but we're not
13 entirely sure, the shifting testimony before the grand jury
14 could very well be Brady.

15 THE COURT: Let me ask the government counsel, without
16 telling me the content of what came before the grand jury, are
17 you aware of any witness who has changed their testimony as to
18 any of the events that we're talking about or their version of
19 events, as opposed to the government's understanding of who the
20 signers of -- the eligible signers were that has changed?

21 MR. BHATIA: I'll give, first, the caveat that I have
22 to give. I wasn't in the grand jury the first time.

23 THE COURT: You have assuredly reviewed the
24 transcript.

25 MR. BHATIA: I have. I believe it's the former of

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1 what you said -- or it's the latter, I should say. It's new
2 evidence and continuing investigation. But we'll go back and
3 confirm that there's nothing we need to disclose that's Brady.

4 THE COURT: If there was somebody at the bank who
5 originally said he said he's Peter Rebenwurvel and then later
6 said the defendant said he's one of the following three people
7 or he's not Peter Rebenwurvel, then you're in potential
8 Brady-land. If instead what happens hand is the government has
9 developed a more sophisticated understanding of who the
10 authorized signatories are, it's not a Brady issue. The
11 government is entitled to refine its charges as it understands
12 the facts. That's not Brady.

13 The issue, though, is a different one that your
14 question raises which is, is the conduct described aggravated
15 identity theft? I've never had occasion to look into it.
16 Perhaps Mr. Bhatia is right. It's certainly not the paradigm
17 of the way we think of the offense, but that's not to say it's
18 not the offense. So a letter is the way to smoke that out.

19 Anything further about the trial before we return to
20 the grand jury issue?

21 MR. GELFAND: Trial, no, but one other pending letter
22 motion. We'd filed a request permitting Mr. Teman to travel to
23 St. Louis where my office is based.

24 THE COURT: Does the government object to Mr. Teman's
25 traveling to St. Louis where, I take it, one of his lawyers is

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1 based?

2 MR. BHATIA: No objection.

3 THE COURT: Has Mr. Teman been in any way out of
4 compliance with the terms of his pretrial release?

5 MR. BHATIA: I haven't spoken with the Pretrial
6 Services officer recently. I do understand from a
7 representation from defense counsel that they did -- am I right
8 -- that they did speak to the Pretrial Services officer who had
9 no objection.

10 MR. GELFAND: Your Honor, for the record, I spoke with
11 the New York pretrial officer and with the Southern District of
12 Florida pretrial officer, both have expressed no objection to
13 that.

14 THE COURT: I'm going to trust, as an officer of the
15 court, your representation of that.

16 What is the state of Mr. Teman's travel documents?
17 Does he have -- I mean, he doesn't need a passport to travel
18 with, correct, to travel to St. Louis with?

19 MR. GELFAND: No, he just as a Florida driver's
20 license.

21 THE COURT: Who's got his passport?

22 THE DEFENDANT: Your Honor, I believe the Florida
23 probation or court.

24 THE COURT: Pretrial. Look, Mr. Gelfand, given the
25 government's consent and your representation that pretrial

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1 consents, I'm fine with it, but I don't want this to be an
2 occasion for him to get his hands on a passport that was taken
3 away as part of the bail package. I assume he, like the rest
4 of us, can travel domestically without a passport.

5 MR. GELFAND: Yes, your Honor. He wouldn't travel the
6 same way he traveled up here from Florida for court.

7 THE COURT: In that case, I will authorize it. Please
8 get me an agreed order today. I'm out next week. Get me an
9 agreed order today. It doesn't need to be agreed. It can be
10 from the defense along the lines that I described. I'll be
11 happy to authorize it.

12 MR. GELFAND: Thank you.

13 THE COURT: Very good. Anything further besides the
14 grand jury matter?

15 MR. BHATIA: Nothing, your Honor.

16 THE COURT: All right. Let me then briefly take up
17 that last matter.

18 All right. I have this morning spoken with Judge
19 Kevin Castel. He is the Part 1 judge, and --

20 MR. GELFAND: Your Honor, I'm sorry to interrupt you.
21 I just wanted to note for the record, just so I'm on the right
22 side of where I need to be, obviously, I represent Mr. Teman
23 admitted pro hac vice. I am not entered on the grand jury
24 matter, and I wanted to raise that with the Court. I'm not
25 sure that --

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1 THE COURT: Sorry. Who represents the -- it's
2 Mr. DiRuzzo?

3 MR. DIRUZZO: Correct, your Honor.

4 THE COURT: Given the highly general statement I'm
5 about to make, I don't think there's any problem with your
6 presence.

7 MR. GELFAND: OK.

8 THE COURT: But thank you for your candor about that.

9 MR. GELFAND: Thank you.

10 THE COURT: I've spoken with Judge Castel. He is the
11 judge sitting in Part 1. He is the judge to which, in the
12 first instance, grand jury matters are properly addressed. He
13 has referred the matter to me in an order that assigns the
14 grand jury dispute to me, given its obvious connection to this
15 current proceeding, will issue today. So, briefly, I have
16 received from Judge Castel this morning the defense petition to
17 quash three grand jury subpoenas dated December 18 directed at
18 three entities associated or said to be associated with
19 Mr. Teman, and I have received on Wednesday night from the
20 government as, I guess, a courtesy copy its opposition. I also
21 received, I guess, as a courtesy copy as well, an *ex parte*
22 letter from the government addressing these matters.

23 I will note that I think the letter was actually
24 addressed to me as the trial judge in the case, even though
25 this is a grand jury matter. Until I spoke to Judge Castel

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1 this morning, this was not my matter. You really have to be
2 faithful about addressing these things to the judge responsible
3 for them, Judge Castel.

4 That said, there was ample good reason for it to be
5 transferred to me. The issues that are litigated by the
6 defense, in particular, involve this case insofar as the
7 defense is claiming that the grand jury subpoena either was
8 intended to or could function as a way of getting trial
9 evidence. So it's quite proper that it winds up with me, but
10 as a formal matter, in the initial -- in the first instance, it
11 was for the Part 1 judge.

12 In any event, now that the matter is in my court, I've
13 reviewed these materials. I will state for the record that the
14 government's *ex parte* letter was appropriately submitted *ex*
15 *parte*. It concerns core grand jury matters as to which grand
16 jury secrecy applies. Mr. Teman and these companies have
17 absolutely no right to any notice of the matters that are
18 reflected in that letter.

19 Here's how I intend to proceed. I'm going to give the
20 defense until Friday, January 17, to respond to the
21 government's public submission, that is to say, the non-*ex*
22 *parte* submission. I'm not going to invite argument on these
23 matters at this time, and that's for a couple of reasons.

24 First of all, I haven't adequately studied the issues
25 presented. I just spoke with Judge Castel this morning and

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1 have arranged the reassignment to myself with his consent, and
2 I am interested in getting Mr. Teman's reply before I do so.

3 Second of all, the purpose of this conference is the
4 upcoming trial, not a separate grand jury proceeding. So I'm
5 not inviting argument or discussion today on the defense
6 application to quash the subpoena.

7 For avoidance of doubt, I note that Mr. Teman is
8 arguing really two things. One is there's a Fifth Amendment
9 privilege that protects against the production that's requested
10 here. Second, he's arguing that the grand jury subpoena is
11 being used by the government predominantly for an improper
12 purpose, that is to say, as a means of gaining evidence for use
13 in the upcoming trial. Now, the government properly notes that
14 at the time the subpoenas were issued on December 18, the grand
15 jury had not yet been asked to return and hadn't returned the
16 S2 superseding indictment. The accusation that the defense
17 makes is a bit out of time in the sense that at the time the
18 subpoena was returned, we know for a fact that the government
19 was in the superseding process. So there was an open grand
20 jury matter relating to this case, putting aside whatever else
21 the grand jury might or might not be investigating. So there's
22 assuredly at the time a valid grand jury purpose for the
23 subpoena.

24 Even if I need to say this, the date, December 18, on
25 which the subpoenas were issued, called into significant

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1 question whether it was at all realistic that there would be a
2 production in response that would come in before the date the
3 government had to get to the grand jury to supersede as it had
4 promised to in this case. Be that as it may, there was an open
5 grand jury proceeding.

6 At this point, however, the fact for all of us is that
7 the grand jury has returned its superseding indictment. It did
8 so on January 3, and so whatever else the grand jury may or may
9 not be investigating as to the charges that Mr. Teman will face
10 in the trial beginning January 21, those charges are set. They
11 may be reduced if there's a basis for a voluntary dismissal or
12 dismissal by the Court of some charge, but there's not going to
13 be an expansion. Those charges are set. In other words, there
14 won't be any further superseders prior to the date of trial as
15 to what Mr. Teman is being tried on beginning January 21.

16 So Mr. Teman's concern at this point is that whatever
17 the government's intentions had been as of December 18 when it
18 had an ongoing grand jury proceeding relating to this trial, to
19 the extent that the government might be pursuing compliance
20 with a subpoena so that they could be -- the return could be
21 used in connection with this case, that purpose would not be
22 proper because the indictment is already in place and can't be
23 superseded.

24 So here's the easy way to resolve this issue. My
25 intention is going to be to resolve the grand jury privilege

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1 dispute shortly after the completion of the trial. That way,
2 by definition, that will be in a few short weeks. That will
3 moot any possible claim that the grand jury subpoena, even if
4 issued with pure purposes, is at this point being pursued for
5 the purpose of bolstering the government's trial proof in an
6 already indicted case. I will resolve the issue promptly after
7 the trial is resolved, assuming that there is a verdict as
8 opposed to a hung jury. There can't be any claim at that point
9 that the government's insistence on continued compliance with a
10 grand jury subpoena is aimed at bolstering its trial proof.
11 That's the clean and easy way to resolve the issue here.

12 Any objection to that?

13 MR. DIRUZZO: No, your Honor.

14 MR. BHATIA: No, your Honor.

15 THE COURT: All right. So we'll go that route.

16 Anything further from anyone?

17 MR. GELFAND: Just two quick questions, your Honor.

18 One, does the Court have a preference as to whatever numbering
19 convention the defense uses for exhibits? I know some courts
20 do.

21 THE COURT: Sequential would be great.

22 MR. GELFAND: A, B, doesn't make a difference?

23 THE COURT: Prime numbers. Right, you can use letters
24 or numbers, no. But, look, I would ask you, to the extent
25 there are defense exhibits that are offered during the course

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1 of the trial, make sure that you've -- I expect the
2 government's daily log of what's been received will include
3 defense exhibits. I'm looking for a one-stop shop. You should
4 look at that to make sure that they're accurately tabulating
5 any defense exhibits that have been received.

6 MR. GELFAND: Absolutely. Just one other quick
7 housekeeping question. It sounds like, based on the
8 government's representation, there's virtually no chance that
9 if we have any defense witnesses, that they're going to have to
10 be here before Thursday. Is that fair? I don't want to -- if
11 I don't need to, I don't want to inconvenience anyone more than
12 I have to by telling them --

13 THE COURT: Mr. Bhatia, what is the earliest
14 conceivable date on which the government could rest?

15 MR. BHATIA: Your Honor, I think, of course, we always
16 give a conservative estimate for what we think will be the
17 trial, but on the earliest that we could conceivably close, I
18 believe it's probably sometime Wednesday. Then, of course,
19 that depends on the length of cross and how the evidence comes
20 in, but it could be sometime Wednesday.

21 THE COURT: There you have it.

22 MR. GELFAND: We can work with that.

23 THE COURT: Look, I appreciate that the witnesses in
24 question may be coming from other states, or maybe not?

25 MR. GELFAND: I don't believe so, your Honor.

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1 THE COURT: Well, then --

2 MR. GELFAND: We'll make it work.

3 THE COURT: The legal principle of no big deal
4 probably applies here, right? If it's in the same state, you
5 can take stock at the end of the day Wednesday of how things
6 are going. I'm happy to ask Mr. Bhatia, at your request,
7 whether at that point it's clear that the government will fill
8 the day on Wednesday. But if, in fact, there's a scenario
9 under which the government's going to rest and there's enough
10 time to have the usual Rule 29 colloquy and then you might be
11 on the clock, I think you will need to have that person there.
12 I really am serious about using all of our time.

13 MR. GELFAND: No problem, your Honor. Thank you.

14 THE COURT: Very good. Yes.

15 MR. DIRUZZO: Judge, my experience trying cases, I
16 find that judges kind of have three different buckets for
17 openings for exhibits. Some judges will say if it's not
18 admitted, you can't publish it, you can't refer to it, you
19 can't show it to the jury in opening. You can refer to it in
20 the abstract. There are other judges, if everyone agrees it's
21 coming in, you can refer to it, maybe put up on the ELMO in
22 opening. I just want to get your take because I don't want to
23 get an objection.

24 THE COURT: I'm not going to answer an abstract
25 question. I've had the occasional civil case where it's clear

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1 that the copyright infringing video's coming in, and it's an
2 incoherent opening without it. This is not that case.

3 What do you have in mind?

4 MR. DIRUZZO: Like the contracts, in particular.

5 THE COURT: The government?

6 MR. BHATIA: Your Honor, I think it might be helpful
7 for us to confer with the defense on this. Right now I'm not
8 sure what contracts in particular they're referencing. I'm not
9 really aware of any contracts, but I don't know what contracts
10 in particular, so it's hard for us to answer that question.

11 THE COURT: Let me ask the question. Mr. DiRuzzo, I
12 can't remember a criminal case in which, other than something
13 like a map, I've allowed counsel to use exhibits during the
14 opening. It's just a little too fraught because we don't know,
15 in a criminal case, what's going to come in and what's not.

16 MR. DIRUZZO: I understand, Judge.

17 THE COURT: So absent explicit authorization of the
18 Court, you are not to use exhibits in the opening statement.

19 MR. DIRUZZO: OK.

20 THE COURT: That's easier. If you confer with the
21 government and everyone agrees that something's clearly coming
22 in, I will reconsider, but even then, unless I've affirmatively
23 authorized it, no exhibits in the opening, and you should
24 prepare accordingly.

25 MR. DIRUZZO: OK. Thanks, Judge.

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1 THE COURT: Anything further from anyone?

2 MR. BHATIA: Nothing, your Honor.

3 MR. GELFAND: Can we just confer with Mr. Teman for a
4 moment?

5 (Counsel confer)

6 MR. GELFAND: We have nothing further, your Honor.
7 Thank you.

8 THE COURT: All right. Before we adjourn, I want to
9 just take a moment and compliment and thank everyone for the
10 level of attention to detail that went into all of the motions
11 that preceded the conference. That helps me. As a result of
12 your raising those issues early, you've come out of this
13 conference with a pretty good sense of what the ground rules at
14 trial will be and what's in and what's out. Keep doing that.
15 Although I will be away teaching next week, I will be getting
16 things from chambers. If there's some other dispute that
17 arises, to the extent I can helpfully resolve it beforehand or
18 at least answer it on Tuesday morning, I'm happy to do so, but
19 we all benefit by clarity of ground rules, so keep it up.
20 That's very valuable to me.

21 Government, with respect to Counts Five and Six, I'm
22 not telling you what to do. You'll make your own judgment
23 about whether or not the law permits you to get to a jury on
24 the theory of aggravated identity theft that you have here. I
25 would urge the government to reflect on what that theory, those

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1 counts, add to the four preceding counts. In other words, if
2 the theory is a lack of authorization, it's not obvious to me
3 that there's a scenario under which Counts Five or Six come out
4 in your favor and Counts One through Four do not. I could be
5 wrong about that. Maybe I'm missing something, but you ought
6 to be having a thoughtful conversation whether it adds more
7 heat than light to add on to those counts if there aren't more
8 facts than the ones you have proffered to me in support of
9 those claims. Your choice. Just saying.

10 MR. BHATIA: Thank you, your Honor.

11 THE COURT: All right. Thank you. We stand
12 adjourned.

13 (Adjourned)

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A-137.96



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U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

January 14, 2020

BY CM/ECF

The Honorable Paul A. Engelmayer
United States District Judge
Southern District of New York
United States Courthouse
40 Foley Square
New York, New York 10007

Re: United States v. Ari Teman,
S2 19 Cr. 696 (PAE)

Dear Judge Engelmayer:

The Government writes to inform the Court that it has elected not to proceed at trial on Counts Five and Six contained in the Second Superseding Indictment, returned January 3, 2020 (ECF No. 55).

Respectfully submitted,

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York

By: /s/
Kedar S. Bhatia
Assistant United States Attorneys
(212) 637-2465

cc: Justin Gelfand, Esq.
Joseph DiRuzzo, Esq.

K1LVTEM1 corrected

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

19 CR 696 (PAE)

5 ARI TEMAN,

6 Defendant.

JURY TRIAL

7 -----x

8 New York, N.Y.
9 January 21, 2020
9:00 a.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13 APPEARANCES

14
15 GEOFFREY S. BERMAN,
16 United States Attorney for the
17 Southern District of New York
18 KEDAR S. BHATIA
EDWARD A. IMPERATORE
Assistant United States Attorneys

19 JOSEPH A. DIRUZZO, III
20 JUSTIN GELFAND
Attorneys for Defendant

21 ALSO PRESENT: DANIEL ALESSANDRINO, NYPD
22 WILLIAM MAGLIOCCO, Paralegal, USAO
23
24
25

K1LVTEM1 corrected

1 (Case called)

2 MR. BHATIA: Good morning, your Honor.

3 Kedar Bhatia and Edward Imperatore, for the United
4 States.

5 We're joined at counsel table by Detective Daniel
6 Alessandrino of the New York Police Department, and Paralegal
7 Specialist William Magliocco of the U.S. Attorney's Office.

8 THE COURT: All right. Very good.

9 Good morning Mr. Bhatia; good morning, Mr. Imperatore;
10 good morning, Mr. Magliocco; and good morning, Detective
11 Alessandrino.

12 Did I get everyone's pronunciation correct?

13 Very good.

14 And for the defense.

15 MR. GELFAND: Good morning, your Honor.

16 Joseph DiRuzzo and Justin Gelfand on behalf of Mr.
17 Teman, who is on bond and present in the courtroom.

18 THE COURT: All right. Very good.

19 Good morning, Mr. DiRuzzo; good morning, Mr. Gelfand;
20 and good morning to you, Mr. Teman.

21 You may all be seated.

22 All right. I have a number of matters to take up
23 before we have jury selection this morning. You should know
24 that while I had anticipated that we might have a delay in jury
25 selection because another case, a large case, was going to be

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1 picking a jury today, due to reasons specific to that case,
2 that case apparently is not going forward today. So my
3 expectation is that we are batting first, if you will, in terms
4 of what the jury clerk will do.

5 So it will be a little while. The jurors have to show
6 up; they need to be inculcated in the process of being a juror.

7 But once they are ready to dispense jurors to a court,
8 I think we come first. So hopefully we'll be making productive
9 use of time today.

10 All right. There are quite a number of things to take
11 up this morning. And I have a bench ruling which will address
12 both the proposed instructions that you gave me on the check
13 stub and the RCC issues; and will also resolve what are now two
14 additional, effectively, sets of motions *in limine* that I have
15 had letter briefed over the course of the week. I then have a
16 number of other issues I want to raise with you.

17 Before I embark on the bench ruling, let me just take
18 stock with counsel if there's anything that I need to be
19 attentive to today. Any issue you want to raise?

20 (Counsel conferred)

21 MR. BHATIA: Your Honor, you may have noticed in the
22 briefing on the motion to quash there is reference to a
23 subpoena to the defendant -- if-as-or-when subpoena to the
24 defendant. Previously we have --

25 THE COURT: This is a motion to quash the grand jury

K1LVTEM1 corrected

1 subpoena?

2 MR. BHATIA: That's right.

3 THE COURT: I'm ignoring that until after the trial.

4 MR. BHATIA: So what I wanted to say is I wanted to --
5 with leave of the Court, I'd like to give the defendant the
6 if-as-or-when subpoena that we were intending to serve on him
7 previously.

8 THE COURT: With respect to this trial.

9 MR. BHATIA: With respect to this trial.

10 THE COURT: You're welcome to do so, of course.

11 And to be clear, defense, while the grand jury
12 subpoena is something I will reserve resolution on until after
13 the trial, so that there's no doubt, the if-and-and-when
14 subpoena, if I've got that right, is a separate beast. That's
15 not being suspended. The obligations that attach to a
16 defendant's production of documents, when and if he testifies,
17 are not suspended merely because there's a separate grand jury
18 controversy afoot.

19 So take a look at that subpoena. I don't know whether
20 or not there are any issues I need to deal with; but understand
21 that it is a completely separate issue from the grand jury
22 matter that's been tabled.

23 MR. GELFAND: Your Honor, we appreciate that.

24 We do anticipate that there are completely separate
25 issues, in particular regarding the nature of the subpoena and

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1 what it requires of Mr. Teman, the defendant in this case.

2 With the permission of the Court, we'll do our best by
3 the end of today -- obviously not the court day, but by
4 midnight tonight -- to file anything that we believe is
5 appropriate. But I just wanted to raise that with the Court.

6 THE COURT: That's fine. I'm not going to resolve
7 anything without hearing your response. If you can get me
8 something tonight, that would be great.

9 I will need a copy, of course, of the subpoena that
10 was just hand-delivered by the AUSA to the defense. So why
11 don't you attach it to your letter.

12 MR. GELFAND: Yes, your Honor. Thank you.

13 THE COURT: All right. Very good.

14 Anything else to raise?

15 MR. BHATIA: Yes, your Honor.

16 Just regarding that subpoena, we'll provide a copy of
17 it to the Court today.

18 And in addition, I wanted to just note for the record
19 that we sent it electronically to defense counsel on January
20 12th to ask if they would accept service. We didn't hear
21 anything back. And then we saw on our -- their motion to quash
22 on Friday.

23 THE COURT: All right. Look, defense, just so that we
24 don't have any delays, while I appreciate that there may be
25 colorable objections to aspects of the subpoena, maybe the

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1 whole thing, be prepared, nevertheless, to produce in response
2 to it, so that if I disagree with whatever arguments you are
3 going to be making, we don't have a situation where we are
4 then -- only then engaged in document collection. Okay?

5 MR. GELFAND: Yes, your Honor.

6 THE COURT: All right.

7 Anything else to raise?

8 MR. BHATIA: Nothing else from the government.

9 MR. GELFAND: Not for the defense, your Honor.

10 THE COURT: All right.

11 Let me just quickly take care of a few discrete things
12 before getting into the bench decision.

13 First of all, I just want to make sure, I believe we
14 covered this at a prior conference, but the defense is not
15 making an advice of counsel defense in this case; correct?
16 There's been no notice of that and I haven't seen anything to
17 that effect.

18 (Counsel conferred)

19 MR. DiRUZZO: Your Honor, we are. And although --

20 THE COURT: When did you give notice of that?

21 MR. DiRUZZO: I don't believe that Rule 12.1, 2, or 3
22 requires advanced notice of an advice of counsel defense.

23 THE COURT: Tell me what the advice of counsel defense
24 consists of; in other words, who and what. I want to make sure
25 that there's -- I read through the government exhibit binder.

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1 There are a lot of documents where Mr. Teman has threatened
2 lawsuits and the like. I didn't see any reference to counsel.
3 I wasn't aware that there was an advice of counsel defense
4 here. Go ahead, tell me about it.

5 MR. DiRUZZO: Your Honor, in the documents the
6 government has produced in discovery, there's been emails from
7 a Mr. Ariel Reinitz, who works for the law firm -- is a partner
8 of the law firm of FisherBroyles. Mr. Reinitz is Mr. Teman's
9 attorney. And Mr. Reinitz is and has been intimately involved
10 with, among other things, the collection efforts of GateGuard's
11 to GateGuard's customers, including some of the customers that
12 are at issue in this case.

13 Does that answer your Honor's question?

14 THE COURT: And did you give notice to the government
15 that there was a potential advice of counsel defense here?

16 MR. DiRUZZO: No, your Honor. We didn't believe the
17 rules contemplate that. We believe that constitutionally we
18 are not required to do so.

19 THE COURT: All right.

20 And it's your expectation that Mr. -- give me the
21 spelling of that person's name?

22 MR. DiRUZZO: R-E-I-N-I-T-Z.

23 THE COURT: And is it your expectation that he may be
24 called as a witness on the defense case?

25 MR. GELFAND: Yes, your Honor. We anticipate calling

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1 him as a witness. I would also note that he was included on
2 the joint proposed witness list for the voir dire that was
3 submitted by the parties.

4 THE COURT: Okay. Government?

5 (Counsel conferred)

6 MR. BHATIA: Your Honor, we haven't received any
7 notice of an advice of counsel defense. I'll also note that I
8 don't believe there's any joint witness list in this case. We
9 submitted a list of the names and entities that might come up
10 during the course of trial. So we certainly haven't had notice
11 of calling an attorney as a defendant -- as a witness.

12 THE COURT: Was the defense obligated to do so?

13 (Counsel conferred)

14 MR. BHATIA: Your Honor, as an affirmative defense, we
15 do believe they are required to do so and they haven't provided
16 any notice of it. In addition, we've received Rule 16
17 discovery, but we haven't received any discovery involving
18 attorney-client communications between Mr. Teman and
19 Mr. Reinitz.

20 THE COURT: All right.

21 Look, obviously this is something that requires letter
22 briefing; so I would welcome a letter tonight from the
23 government with its views about the advice of counsel defense:

24 A, whether or not there was required notice; B, what,
25 if any, discovery at this stage is required of the defense; C,

K1LVTEM1 corrected

1 assuming that the witness is to go forward, what, if any,
2 discovery would later be provided.

3 I don't think I saw, defense, in your proposed jury
4 charge an instruction on the advice of counsel defense.

5 Was there one?

6 MR. GELFAND: There wasn't one.

7 THE COURT: Why was there not one?

8 MR. GELFAND: Because when the jury instructions were
9 due, we were, candidly, still receiving discovery from the
10 government. Within the past week, your Honor, we received
11 5,000 new pages from the government, and we were still making
12 strategic decisions.

13 THE COURT: I appreciate that.

14 But as you well know, when you submit proposed
15 charges, you are supposed to be inclusive, not exclusive. It
16 looks like that's an act of hiding the ball, when apparently
17 you were considering it all along and didn't include it in the
18 proposed jury charges.

19 MR. GELFAND: Your Honor, our intention certainly
20 wasn't to hide the ball.

21 The other thing I would note, and I would point the
22 Court's attention to a Second Circuit case called *Scully*, which
23 clearly and accurately states that advice of counsel is not an
24 affirmative defense in the criminal context; it's a way to
25 defeat or otherwise challenge the *mens rea*.

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1 THE COURT: I understand that. And I didn't take
2 Mr. Bhatia's characterization as an affirmative defense as
3 changing that fundamental principle. The issue is always
4 whether or not the government can establish beyond a reasonable
5 doubt the *mens rea* requirement of the statute. That's not the
6 point.

7 The issue here is whether notice was required of the
8 intention to call a -- to invoke that defense; and what, if
9 any, implications there are from the failure of the defense to
10 include an instruction along those lines in its request to
11 charge.

12 You were, I take it, at least considering such a
13 defense at the time you submitted the request to charge?

14 MR. GELFAND: Considering, yes. But given that that
15 obviously -- it comes with the possible arguments of waiver and
16 implied waiver, etc. We did not include an instruction. We
17 will submit a supplemental instruction for the Court's
18 consideration.

19 THE COURT: Yes, please do so tonight.

20 Look, I will wait for the government's letter as to
21 addressing this point, and I'll give you a brief opportunity to
22 respond. But as you can see, I, reading through the Rule 16
23 materials, immediately recognized that this case had at least
24 the potential to implicate advice of counsel issues, because
25 your client is repeatedly threatening legal action. I couldn't

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1 tell whether he's doing that on his own dime or with the advice
2 of counsel, but it leapt off the page as an obvious issue.

3 Government, have you asked the defense in writing or
4 orally whether it would be pursuing an advice of counsel
5 defense? I mean, it leaps off the page from the discovery you
6 have provided as a subject that a court would be curious about.
7 I assume you must have thought about this.

8 MR. BHATIA: No, your Honor, I don't believe -- I know
9 in our initial discovery letter we make certain requests. I
10 don't recall -- I don't believe that the advice of counsel was
11 one of those.

12 THE COURT: In your letter to me tonight, you should
13 concretely address whether or not the government explicitly or
14 implicitly has asked the defense about that subject. It may
15 well be that any obligation the defense had may have been only
16 in response to a question by the government. I don't know the
17 law in the area enough to opine confidently, but I expect a
18 comprehensive letter on this point.

19 I would also welcome each of your submitting the
20 proposed instruction as to advice of counsel along with your
21 letter.

22 So, government, get me a letter tonight.

23 Defense, get me a letter as quickly as possible
24 thereafter, but no later than tomorrow night. Okay?

25 MR. GELFAND: Yes, your Honor.

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1 THE COURT: All right.

2 Next. Just raising issues here.

3 It appears to me that Count One embraces checks from
4 three entities: Entities 1, 2, and 3.

5 Count Two embraces checks from two entities: Entities
6 3 and 4.

7 It strikes me as entirely likely that, at a minimum,
8 there will need to be an instruction with respect to unanimity,
9 lest there be a risk that six jurors convict as to Entity 1,
10 and six convict as a Entity 2, and there's no unanimity as to
11 any of them.

12 Beyond that, though, there is a substantial question
13 of whether or not the verdict form, which, as submitted by the
14 government and acquiesced then by the defense, simply answers
15 yes or no, guilty or not guilty, for each count, ought to take
16 account of the fact that the counts bundle together multiple
17 victims that may have multiple entities that may have different
18 narratives associated with them.

19 It seems to me there's a substantial argument here
20 that the verdict form ought to inquire more specifically of the
21 jury with respect to particular entities. I'd welcome each
22 side giving thought to that. I don't need to decide that now;
23 but, again, in preparing for today, that leapt out at me as a
24 relevant question.

25 All right. Government, you have moved to dismiss

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1 Counts Five and Six; is that correct?

2 MR. BHATIA: That's correct.

3 THE COURT: All right.

4 Defense, I take it, no objection?

5 MR. GELFAND: No objection.

6 THE COURT: All right. Then I will dismiss Counts
7 Five and Six on the government's motion.

8 All right. With that, I want to read aloud some bench
9 rulings to you.

10 All right. As before, there's not going to be a
11 written opinion. The rulings I'm about to make will be
12 reflected in the transcript here. And so if you need the text
13 of the ruling, you'll need to order the transcript.

14 I should ask, counsel, I assume you've ordered or plan
15 to order daily copy?

16 MR. BHATIA: That's right.

17 THE COURT: All right. Very good.

18 I will need that, because obviously it's likely to be
19 a relatively short trial. And when the jury goes out, if they
20 ask for excerpts of testimony, I want to make sure that we all
21 have the transcript handy so that you can very promptly search
22 the transcripts for responsive material.

23 All right. I have received, counsel, your joint
24 letter dated January 15th, docketed at Docket 80. That letter
25 sets out the parties' views as to potential instructions as to

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1 two discrete points. I had asked for your input as to these in
2 my bench ruling on January 10, resolving the various motions *in*
3 *limine*. Here is how I presently intend to address each
4 subject:

5 First, as to the check stock found in Teman's
6 possession at the time of his arrest, I asked counsel for "a
7 proper limiting instruction regarding the purposes for which
8 the jury may and may not consider the check stock seized from
9 Mr. Teman's office on July 3rd, 2019." That is a direct quote
10 from my bench opinion.

11 Counsel, what you submitted is not at all responsive
12 to what I asked you to do. You have, instead, agreed upon a
13 completely generic proposed instruction setting forth legal
14 principles governing similar act evidence in general which does
15 not refer at all to the check stock. With all respect, the
16 instruction you gave me is unhelpful for that purpose, it is
17 useless; indeed, it is arguably worse than unhelpful, because
18 it states to the jury at the outset, before setting out these
19 general generic principles, and I quote: "The government has
20 offered evidence tending to show that on another occasion, the
21 defendant engaged in conduct similar to the charges in the
22 indictment.

23 That statement is, to my knowledge, factually false.
24 I cannot imagine what the two of you were thinking or all four
25 of you were thinking about in asking me to tell the jury that.

K1LVTEM1 corrected

1 The government has not given Rule 404(b) notice, and
2 the Court has not been informed of any evidence that might be
3 offered at trial that Teman ever deposited or tried to deposit
4 unauthorized checks other than those charged. I do not know
5 what counsel were thinking in proposing that I tell the jury
6 that effectively there is such evidence.

7 To defense counsel in particular, I note that the
8 statement in the joint proposed instruction could affirmatively
9 harm your client in inaccurately implying that there has been
10 evidence at trial of his deposit of unauthorized checks other
11 than those charged in the indictment, or that the check stock
12 found in his office had been used to create other unauthorized
13 checks.

14 I have taken it upon myself to draft an alternative
15 instruction which I will read to you for your views. But,
16 counsel, I expect better of you and you need to do better when
17 the Court asks you for a proposed instruction. The instruction
18 you proposed was both nonresponsive and misleading.

19 With that, here goes as to the proposed instruction.

20 "You have heard testimony that at the time of the
21 defendant's arrest on July 3rd, 2019, blank check stock was
22 seized from his office. It is for you to decide whether or not
23 to credit this testimony. If you do, I want to instruct you as
24 to the strictly limited purposes for which you may consider
25 this check stock.

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1 "Specifically, you may consider this evidence to the
2 extent, if any, that you concluded it bears on the defendant's
3 knowledge; in particular, whether he had the knowledge and
4 capability to create the checks at issue in this case. You may
5 also consider this evidence to the extent, if any, that you
6 conclude that it bears on the defendant's intentions in
7 connection with respect to the use of the checks at issue in
8 this case.

9 "However, you may not consider the check stock found
10 in the defendant's office for any other purpose. Specifically,
11 you may not consider it as indicating that the defendant
12 engaged in any unlawful conduct other than that alleged in the
13 indictment. You may not consider this evidence as indicating
14 that the defendant had a criminal personality or a bad
15 character. This evidence instead was admitted for much more
16 limited purposes and you may consider it only for these
17 purposes."

18 Are there any objections to that instruction?

19 MR. DiRUZZO: No, your Honor.

20 MR. BHATIA: No, your Honor.

21 THE COURT: All right.

22 I will ask counsel to alert me when counsel believes
23 it is an appropriate time for me to give that instruction.

24 Now, as to the instruction as to remotely created
25 checks, or RCCs, I propose to give the following instruction to

K1LVTEM1 corrected

1 the jury: As you will see, it draws on both sides' proposed
2 instructions on this point. The main point I want to leave the
3 jury with is that RCCs are a lawful thing, while making clear
4 that the issues in this case do not involve technical
5 compliance with the regulatory definition of RCCs.

6 Here goes:

7 "You have heard reference to something called a
8 remotely created check, also known for short as an RCC. A
9 remotely created check is a check that is not created by the
10 paying bank and that does not bear a signature applied or
11 purported to be applied by the person on whose account the
12 check is drawn.

13 "I instruct you that the banking laws in this country
14 do permit the use of remotely created checks under certain
15 circumstances, provided, of course, that the customer on whose
16 account the check is drawn has authorized the check. However,
17 this case does not involve whether or not the checks in
18 question here meet the technical definition of a remotely
19 created check, and you should not concern yourself with that.

20 "The question for you will be whether or not the
21 government has proven beyond a reasonable doubt the elements of
22 the offenses charged, which, again, are bank fraud and wire
23 fraud. I will instruct you on the elements of those offenses
24 later in the trial, after all of the evidence has been
25 received."

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1 Are there any objections to that instruction?

2 MR. BHATIA: No objection.

3 MR. GELFAND: No objection.

4 THE COURT: All right.

5 Then here, too, I'll ask counsel to alert me when
6 counsel believe it's an appropriate time for me to give that
7 instruction.

8 MR. DiRUZZO: Judge, I already know. I'd ask that
9 instruction be given directly after openings.

10 THE COURT: No, there won't be -- my instruction, as
11 you just heard me say is -- it's going to be triggered by
12 evidence. Once there's some evidence in the case, I'll be glad
13 to give that instruction.

14 MR. DiRUZZO: Oh, okay.

15 THE COURT: In other words, I don't know who the first
16 witness is going to be, but I will wait until there's a factual
17 basis for it.

18 MR. DiRUZZO: Okay. Understood, your Honor.

19 THE COURT: It just seems to me otherwise it's sitting
20 out there in the air unconnected to specific evidence. But
21 given the nature of the case, I expect we'll get there soon.

22 All right. I'm next going to turn to Teman's motion
23 to preclude the government from calling as a witness Karen
24 Finocchiaro of Bank of America. I previously denied Teman's
25 motion to preclude her from being called, which was based on

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1 the incorrect claim that her testimony would be that of an
2 expert witness. In my January 10th bench ruling, I held that
3 she is a pure fact witness who would testify based on her job
4 experience as a senior investigator at the bank on Bank of
5 America's handling of chargebacks and the like.

6 Teman now moves, see Docket 81, to preclude
7 Ms. Finocchiaro's testimony on a separate ground. Teman
8 contends that the government has violated its *Giglio*
9 obligations by failing to turn over records relating to
10 approximately seven different lawsuits in which Bank of America
11 has been sued either by federal regulators like the SEC or FTC
12 or CFPB, or in civil litigation. The government opposes this
13 motion. It notes that it has provided *Jencks* Act material for
14 Ms. Finocchiaro and has conducted a full *Giglio* inquiry as to
15 her. See Docket 82.

16 I deny Teman's motion. I regard it, frankly, as
17 frivolous. The defense has not indicated that the lawsuits
18 have any connection or anything whatsoever to do with
19 Ms. Finocchiaro. The defense has not represented that she was
20 a party or a witness to any of these matters. The defense has
21 not represented that she has personal knowledge of any of them.
22 The defense has not articulated any theory under which she
23 received some form of benefit from the resolution, if any, of
24 any of these cases.

25 Teman's motion appears to proceed from the premise

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1 that because Ms. Finocchiaro works at Bank of America and is in
2 position from her employment there to offer testimony as a fact
3 witness, the door is therefore open to impeach her based on
4 unrelated business practices and unrelated litigations and
5 investigations regarding Bank of America. Teman's motion may
6 also proceed from the premise that ostensible impeachment
7 material that might attach to other persons at Bank of America
8 may be used to impeach Ms. Finocchiaro in this unrelated
9 matter.

10 Teman does not recite any evidence supporting either
11 of these remarkable propositions. Taken to its logical
12 extreme, Teman's theory would open the floodgates to vast
13 productions relating to wholly unrelated controversies under
14 the ostensible rubric of *Giglio* for any bank witness called by
15 the government in a criminal case in which a bank was a victim,
16 even, say, the bank teller who identifies the bank robber.
17 Again, there's no legal authority for that. Teman does not
18 offer any reason for the Court to doubt the government's
19 representation that it has fully searched for and produced all
20 *Jencks* material and *Giglio* material, if any, for
21 Ms. Finocchiaro.

22 As an aside, I would note that conceptually, if Bank
23 of America, as one of the alleged fraud victims here, had
24 received a benefit from the government in connection with this
25 case, for example, as a condition of producing documents or

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1 making a witness available for testimony, the government would
2 have a possible -- if not likely -- constitutional disclosure
3 obligation with respect to that. Whether that would be
4 conceived of as *Giglio* or *Brady* would depend on the specific
5 facts, as would whether it would rise in connection with
6 Ms. Finocchiaro's testimony as a fact witness as opposed to in
7 some other context.

8 But there has been no suggestion whatsoever that
9 anything like that happened here. The lawsuits that the
10 defense cites have nothing -- zero -- to do with Teman or the
11 landlords whose checks he allegedly created and deposited with
12 the authorization he allegedly pretended to have. Whatever the
13 circumstances are under which a benefit to Bank of America
14 might be disclosable as *Giglio* for one of its fact witnesses,
15 those circumstances are not present here.

16 And for much the same reasons, under Rules of Evidence
17 402 and 403, I would not permit the defense to cross-examine
18 Ms. Finocchiaro about unrelated disputes or litigations or
19 investigations involving Bank of America, if that is the use to
20 which the defense had in mind in seeking such materials. Such
21 matters are irrelevant to the issues to be tried here. And
22 even if they were glancingly relevant, which they are not, any
23 probative value to such inquiries would be vastly outweighed by
24 the potential for confusion created by inquiries at this
25 criminal trial into other unrelated areas in which Bank of

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1 America has had business controversies. Bank of America is not
2 on trial here; Mr. Teman is. And he is on trial on specific
3 charges that do not implicate Bank of America's unrelated
4 regulatory and litigation history.

5 Finally, as a separate basis for denying the *Giglio*
6 motion here, I note that the *Giglio* obligation extends only to
7 the prosecution team. There is no basis to believe that the
8 U.S. Attorney's Office here has any knowledge or records of the
9 lawsuits cited by the defense. Thus, even if *Giglio* applied --
10 and it does not -- there would be nothing that the government
11 here would be obliged to produce.

12 Turning next to the final issue.

13 The government moves to limit the defense's
14 cross-examination of two witnesses: Joseph Soleimani and Elie
15 Gabay. Each was a landlord or a representative of a landlord
16 and, as such, each was a customer of Teman's. The parties have
17 filed letters as to this issue; the government's is dated
18 January 19th, the defense's is dated January 20th. Neither
19 party's letter has been filed on the public docket of this
20 case.

21 At the outset, I direct both parties to file these
22 letters publicly on the docket of this case by tonight. On the
23 face of the parties' letter, there is no apparent justification
24 for this motion to be litigated outside of public view. The
25 matters discussed in the letters are in the nature of lawsuits

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1 and publicly disclosed complaints. The allegations in these
2 lawsuits and complaints may be unflattering to witnesses or
3 perhaps to Teman, but there is no basis to override the
4 public's right to access litigation on this motion *in limine*.

5 In the event counsel believe there are discrete facts
6 contained in these letters that are properly redacted, I will
7 authorize you to publicly file the letters with narrow
8 redactions keyed to genuinely confidential matters. I will
9 then determine whether there is a basis for such redactions.
10 Because the request for filing under seal originated with the
11 government, I will direct that the government make its public
12 filing first. The defense should then follow with its
13 redactions until the Court has ruled respecting the areas, if
14 any, in which the government continues to assert a basis for
15 filing under seal.

16 Now, as to the content of the government's motion,
17 Soleimani is a principal of ABJ Properties. Teman allegedly
18 deposited into accounts he controlled 24 checks of ABJ's,
19 totaling \$264,000, allegedly without ABJ's authorization.
20 Gabay is a managing director of Coney Management LLC, which
21 manages properties in the New York area.

22 Teman is alleged to have deposited into accounts he
23 controlled a check for \$18,000, and later three checks totaling
24 \$33,000, each drawn on the account of a company managed by
25 Coney, again, without Coney's authorization.

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1 The testimony of these witnesses appears likely to be
2 important at trial. The government's core allegation as to
3 each set of checks is that Teman pretended he had authorization
4 to deposit checks drawn on the customer's account into his bank
5 account, whereas, in fact, he did not. A key factual issue,
6 therefore, appears to be whether Teman had been authorized or
7 believed he had been authorized by ABJ and/or Coney to create
8 and deposit checks drawn on their accounts.

9 Fulsome cross-examination is therefore in order as to
10 the course of dealings that Teman had with these companies,
11 including these two witnesses, to enable the jury to take into
12 account the full measure of the relationships that Teman had
13 with these customers, which may shed light on whether to credit
14 the government's claim of a lack of authorization or Teman's
15 defense of authorization. The Court will permit searching and
16 thorough cross-examination as to Teman's dealings with these
17 customers.

18 To its credit, the government's letter is not seeking
19 to restrict cross-examination about communications or dealings
20 between these customers and Teman. Instead, the government
21 seeks to preclude inquiry into extrinsic matters involving
22 these companies which did not involve Teman, such as complaints
23 or lawsuits brought by or on behalf of tenants. The government
24 disclosed these matters to the defense and what the Court takes
25 to be an appropriate excess of caution.

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1 The government does not represent -- and nor does
2 Teman -- that the claims of improprieties made against these
3 two customers have any direct bearing on the customers'
4 dealings with Teman. Teman does not allege, for example, that
5 the tenants' grievances towards these customers bears on
6 whether the customers gave Teman permission to create and
7 deposit the checks in question. Instead, Teman's theory of
8 relevance is instead solely that Soleimani's and Gabay's
9 conduct towards tenants bears on their character for
10 truthfulness.

11 I will begin with Soleimani.

12 With one narrow exception, I will exclude all the
13 evidence that the government's letter puts at issue with
14 respect to him.

15 Specifically, the government seeks to preclude
16 examination of him as to lawsuits and tenant complaints largely
17 about the physical conditions of housing his company provided
18 or that caused slip-and-falls and the like. These complaints
19 are inadmissible. Whether or not Soleimani is a punctilious
20 landlord or a negligent or cruel or thoughtless landlord does
21 not bear on his credibility.

22 Relatedly the New York Public Advocate last month
23 included Soleimani on its list of the city's worst landlords
24 based on the number of open violations with the city's
25 Department of Housing Preservation and Development, or HPD.

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1 These violations relate to vermin, defective doors, and the
2 perpetuation of hazards. These regulatory violations or
3 alleged violations do not, however, bear on Soleimani's
4 character for truth-telling. They are inadmissible to impeach
5 his trial testimony.

6 Notably, Federal Rule of Evidence 609 addresses the
7 limited circumstances under which a much more serious bad
8 act -- a criminal conviction -- can be used to impeach a
9 witness. Where the conviction is not one like perjury that
10 intrinsically goes to credibility, it is inadmissible as a tool
11 of impeachment, unless the offense was a felony committed
12 within the last ten years. The regulatory violations that are
13 pending or open against Soleimani do not rise or come close to
14 this level.

15 The government, in fact, represents that it has
16 confirmed that neither Soleimani nor Gabay has a criminal
17 record. The Court will therefore exclude all evidence of
18 violations or alleged violations of housing codes such as those
19 tracked by HPD and all evidence of tenant complaints against
20 these landlords.

21 And for avoidance of doubt, obviously that means,
22 defense, there should not be a peep about this in your
23 addresses to the jury.

24 I do so for two independent reasons under the rules of
25 evidence: First, allegations of mismanagement, negligence, or

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1 being a rotten landlord are irrelevant to credibility under
2 Rule 402. Second, even if such allegations had some bearing on
3 Soleimani's credibility, their probative value would be vastly
4 outweighed by various countervailing factors under Rule 403.
5 Inquiry into these alleged housing code-type violations would
6 tend to confuse the jury, prolong the trial, and invite a trial
7 within a trial as to these separate incidents. Such evidence
8 would also create a grave risk of unfair prejudice to the
9 government and the public insofar as the jury might be led to
10 exonerate Teman of frauds of which the evidence might otherwise
11 establish his guilt because they were swayed by such testimony
12 to loathe the landlords whose checks Teman deposited.

13 There is, however, one allegation that is different in
14 nature. The government's letter discloses that Soleimani's
15 company, ABJ Housing, was fined by the New York Housing Court
16 in connection with a tenant, Stanley Howell, who refused to
17 leave his apartment in exchange for monetary payment.

18 In the housing court case involving ABJ and Howell,
19 the Court found in an October 2018 decision, that because ABJ
20 initiated negotiations with the tenant, ABJ's conduct
21 constituted harassment within the meaning of the New York City
22 Administrative Code. This conduct too, to the extent I've
23 addressed it so far, is also not a proper ground for
24 impeachment. Harassment is distinct from lying.

25 However, as Teman points out in his response, the

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1 housing court judge, Jack Stoller, found in his written
2 decision the following: Referring to ABJ Housing as the
3 petitioner and Howell as the respondent, Stoller wrote:

4 "Petitioner did not dispute respondent's testimony
5 that petitioner's employees stated that petitioner would not
6 renew respondent's lease if respondent did not surrender the
7 subject premises, an empty threat against a rent-stabilized
8 tenant who is entitled to a lease renewal by operation of law.
9 Misleading a tenant into believing that the tenant has no other
10 option but to vacate a rent-stabilized apartment voids an
11 out-of-court surrender." See Exhibit A to the government's
12 letter, at 4. And I have eliminated the case law citations in
13 Judge Stoller's opinion.

14 Judge Stoller's opinion does not disclose whether
15 Soleimani personally was one of the ABJ employees who
16 misleadingly told Howell that his lease would not be renewed if
17 he did not surrender the premises. If not, there is no basis
18 to use another employee's misleading statement as a means at
19 this trial to impeach Soleimani. Soleimani's trial testimony
20 here would not be meaningfully discredited merely because of an
21 employee of his misled a tenant.

22 But it is possible that Soleimani was among the
23 employees who personally made that misrepresentation to Howell.
24 If so, although the question under 403 is a close one under
25 which a court could rule either way, I would then permit the

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1 defense at this trial, as a means of impeachment, to establish
2 through a single question or two put to Soleimani that a judge
3 found that in 2017, he had misled a tenant to believe wrongly
4 that his lease could not be renewed. To be sure, I would not
5 permit under Rule 403 more extended inquiry into this matter,
6 nor would I permit extrinsic evidence of this incident to be
7 received, for example, testimony by Howell or examination of
8 Soleimani regarding what happened and whether he agrees or not
9 with Judge Stoller's finding.

10 But a targeted leading question that elicits from
11 Soleimani the fact of this discrete finding by a judge that he
12 misled a tenant on this subject would assist the jury to assess
13 Soleimani's credibility without turning this proceeding into a
14 trial within a trial about the episode relating to landlord ABJ
15 and tenant Howell.

16 And so, government, I will ask you to please inquire
17 of Soleimani whether there was evidence in the housing court
18 case that he was among the ABJ personnel who dealt with Howell.
19 If his answer leaves any doubt in your mind, you need to follow
20 up and do so immediately. Then promptly report back to the
21 Court and the defense. I expect that if the answer is yes,
22 that Soleimani was among the ABJ personnel who dealt with
23 Howell, that Soleimani will have no difficulty on the stand
24 here answering yes to a question from defense counsel about
25 whether a judge so found. Obviously the government is at

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1 liberty to pull the poison and ask the question on direct as
2 well. Cross-examination will then move on to other issues.

3 For a avoidance of doubt, though, defense counsel, in
4 your opening statement, you are not to refer to such matters,
5 and you are not to inquire into them in court unless and until
6 I have given you the affirmative green light to do so.

7 That ends my ruling as to Soleimani.

8 The bottom line is that, at most, a single question or
9 two about the housing court finding of misleading a tenant may
10 be put to the witness; and then, only upon confirmation that
11 Judge Stoller's opinion was referencing ABJ personnel that
12 included Soleimani personally. Otherwise, Soleimani's conduct
13 as a landlord, including court actions and complaints and
14 statements by the New York Public Advocate, is excluded under
15 Rule 403.

16 As to Gabay, I will exclude the evidence proffered by
17 the government. There is much less of it as to Gabay than as
18 to Soleimani. But that which is addressed in the government's
19 letter does not involve false statements or falsehoods.
20 Significantly, too, unlike the incident involving ABJ and
21 Howell, addressed by Judge Stoller, there is no indication that
22 any finding of dishonesty or untruthfulness has ever been made
23 as to Gabay.

24 In questioning Gabay, Teman would therefore be trying
25 to prove up heretofore unestablished claims of sharp business

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1 practices such as rent overcharges that on their own terms have
2 nothing to do with the bank and wire fraud charges here. Rule
3 403 clearly precludes such an inquiry, which would be in the
4 nature of a trial within a trial, into extrinsic acts of
5 possible bad behavior. Whatever slight probative value might
6 be yielded by this exercise is vastly overcome by the risks of
7 confusion, delay, distraction, and unfair prejudice.

8 Finally, I reject as frivolous Teman's claim that
9 precluding this evidence somehow violates his Confrontation
10 Clause constitutional rights. Teman does not have a
11 constitutional right to probe into unrelated business practices
12 of the witnesses against him, even if such inquiry might tend
13 to dirty up the witness by making them look like a careless or
14 callus landlord. Teman notably does not cite any authority
15 supporting that proposition.

16 All right. Therein ends the ruling.

17 Government counsel, I saw a lot of ferment at your
18 table. Is there something you need to bring to my attention?

19 (Counsel conferred)

20 MR. BHATIA: Your Honor, we will inquire with
21 Mr. Soleimani about more of the facts surrounding this
22 incident. But we wanted to clarify that if Mr. Soleimani was
23 not involved in making the misrepresentations to Mr. Howell,
24 then no inquiry would be made of him on the topic.

25 THE COURT: Correct.

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1 The issue is whether because the judge's opinion
2 refers to people at ABJ, personnel without name, it's left
3 unclear to me whether Soleimani was among those people. To be
4 sure, the issue is not whether what Mr. Soleimani tells you
5 now, the issue is whether there was evidence at the proceeding
6 before Judge Stoller that he interacted with the tenant. If
7 there was evidence that he interacted with the tenant, this is
8 coming in.

9 MR. BHATIA: Evidence that he interacted with the
10 tenant in any --

11 THE COURT: Okay. More precisely, that he interacted
12 with the tenant with respect to the issue of renewal. I expect
13 that you will not credulously take Mr. Soleimani's point of
14 view on this. Mr. Soleimani may or may not have denied in
15 front of Judge Stoller that he personally made those
16 statements. Realistically, if he is among the people
17 interacting with the tenant, I think the safer course here is
18 to -- would be for the Court to permit the line of -- that
19 single question or two, rather than creating an open appellate
20 issue about whether you too aggressively took Soleimani's side
21 in denying -- in perhaps arguing that although he dealt with a
22 tenant, it was somebody else in his company who made the
23 misrepresentations. The judge's opinion is indistinct if
24 Soleimani is among the people dealing with the tenant, given
25 his role at ABJ. It seems to me the safer course here is to

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1 permit that line of impeachment which will be over and done
2 within the context of this proceeding in a matter of a few
3 seconds.

4 MR. BHATIA: Understood.

5 We'll inquire with Mr. Soleimani and we'll give an
6 update to the Court.

7 THE COURT: Very good. Thank you.

8 All right. Anything further from the government as to
9 the range of rulings I've just made?

10 MR. BHATIA: Your Honor, nothing regarding the oral
11 ruling you made. But we do have another point regarding the
12 advice of counsel defense.

13 THE COURT: Yes.

14 MR. BHATIA: Do you want to hear that now or --

15 THE COURT: Let me just tidy up the ruling here.

16 Defense, anything about the range of rulings I've just
17 made?

18 MR. GELFAND: No, your Honor.

19 Just to make sure we're on the same page, we will not
20 address the issue regarding Soleimani in any way, shape, or
21 form until the Court gives us the green light.

22 THE COURT: Bingo.

23 MR. GELFAND: The Court will only give us the green
24 light if Mr. Soleimani was involved with these interactions.

25 THE COURT: Right. If there is evidence that he was

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1 interacting personally with a tenant, I think the factual
2 predicate for the limited inquiry exists. But, to be clear,
3 until I've given the green light, let's not go there.

4 MR. GELFAND: Understood. Thank you, Judge.

5 THE COURT: All right.

6 So with that, yes, Mr. Bhatia, you had something about
7 advice of counsel.

8 MR. BHATIA: Yes, your Honor.

9 As we understand it, the advice of counsel defense
10 requires several elements to be met. Among them, that the
11 defendant sought the legal advice relevant to the conduct at
12 issue in the trial; whether he provided all the relevant facts
13 to his counsel; whether his counsel considered those facts and
14 then relayed relevant advice; then whether the client took the
15 advice; and then, of course, that he consulted prior to taking
16 action. The Court's familiar with those elements.

17 THE COURT: I am.

18 MR. BHATIA: Here, there's nothing that appears to be
19 relevant to the conduct at issue in this trial. If the lawyer
20 was involved in assisting with collection efforts, then it
21 might not be relevant at all to the conduct at issue in this
22 trial, which is whether the defendant had authorization to file
23 the checks in question.

24 And so at this point we'd ask for a proffer from the
25 defense about what facts might establish that defense. That

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1 will help the government, sort of, think about --

2 THE COURT: Well, listen -- thank you. You may be
3 seated.

4 It goes without saying that the mere involvement of a
5 lawyer in a situation does not establish the advice of counsel
6 defense. I think in generic terms, Mr. Bhatia's description
7 broadly captures the essence of the advice of counsel defense,
8 which requires that all material facts be disclosed and that
9 the attorney's advice then cover essentially the conduct at
10 issue here. The actual terms of the advice of counsel defense
11 are familiar ones.

12 Whether an advice of counsel instruction is given to
13 the jury obviously will depend on whether the facts permit
14 that. The defense is obviously running a grave risk if it
15 tries to suggest an advice of counsel and ultimately the advice
16 of counsel elements are not made out here. In that case you
17 are running a risk of an instruction to the jury that you can't
18 possibly meet on the facts, which, if anything, could prove
19 unhelpful to the defense.

20 So I'm assuming that all the defense is doing at this
21 point is exploring the possibility of an advice of counsel
22 defense and is not committed to give one.

23 MR. GELFAND: Your Honor, I don't know if this
24 addresses the Court's inquiry, but we're well aware of what in
25 the Second Circuit is required for an advice of counsel

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1 instruction as far as foundation on an evidentiary basis. We
2 anticipate that the evidence will establish that.

3 THE COURT: You're saying that Mr. -- the evidence is
4 going to show that Mr. Teman disclosed to Mr. Reinitz all
5 relevant dealings with respect to each of the customers in
6 question before he created and negotiated each of the checks?

7 MR. GELFAND: Yes, your Honor.

8 THE COURT: And did he do that in writing?

9 MR. GELFAND: No, your Honor.

10 THE COURT: Is there any memorialization that he did
11 that?

12 MR. GELFAND: Your Honor, I apologize. There was
13 frequent communication by email and other channels.

14 THE COURT: I want that produced to me tonight. We'll
15 see about it being produced to the government, but I want all
16 of that documentation produced to me tonight.

17 Surely if you've been planning all along to consider
18 this defense, you've got it. I want all that documentation
19 from lawyer and client produced; because I do not want to have
20 a situation where because the issue was raised late in the day,
21 we need to take an adjournment of the trial where I work
22 through these issues. So I want that produced to me in full
23 tonight.

24 MR. GELFAND: Yes, your Honor.

25 THE COURT: But you're saying that Mr. Teman -- and I

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1 don't pretend to know the range of dealings with the relevant
2 customers that precedes Mr. Teman's creating and negotiating
3 checks, if he, in fact, is the person who did that in each
4 case. I don't pretend to know what all those were.

5 But you're telling me that you have checked with the
6 lawyer, and the lawyer is prepared to testify that as to the
7 narrative -- the relevant parts of the narrative with each
8 customer, Mr. Teman made a full disclosure?

9 MR. GELFAND: Yes, your Honor.

10 THE COURT: So if the customer, for example, disputed
11 that a debt was owed, Mr. Teman faithfully disclosed that in
12 advance to his counsel?

13 MR. GELFAND: Yes, your Honor.

14 And to even take that one step further, this lawyer
15 was the corporate counsel -- I'm using that term loosely, was
16 Mr. Teman's lawyer with respect to these matters for over a
17 year prior to the alleged criminal conduct. And to be clear,
18 we have disclosed to the government in discovery written
19 communications from the lawyer on Mr. Teman's behalf to two of
20 the three entities, to Coney and ABJ.

21 THE COURT: Right. Sorry.

22 But the involvement of the lawyer, a lawyer can be a
23 collection agent, a lawyer may or may not have access to oral
24 communications between Teman and the customer, a lawyer may or
25 may not have access to email communications between Teman and

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1 the customer; and yet those may be quite material to an advice
2 of counsel defense. If the question is put at one level, does
3 the contract allow the creation of remotely created checks,
4 that's one thing. Another issue is does the -- am I allowed to
5 unilaterally go and cut a check for a debt that the customer
6 denies owing.

7 And the question is going to be whether the full range
8 of communications, for example, was showcased to the lawyer,
9 and the lawyer's advice specifically addressed that, and
10 whether the lawyer under oath is going to come here and say
11 that.

12 MR. GELFAND: Yes, your Honor. And what I'm
13 proffering --

14 THE COURT: Is he going to do that?

15 MR. GELFAND: Yes, your Honor.

16 THE COURT: All right. Well, let's get me all the
17 evidence on that.

18 Are you preparing to -- you haven't given prior notice
19 of an advice of counsel defense. I take it you're not
20 proposing to open on that.

21 MR. GELFAND: Your Honor, to be clear, there is no
22 notice requirement as a matter of constitutional law.

23 THE COURT: But you didn't even include it in your
24 requests to charge; in other words, you misled me. The point
25 is, you know, requests to charge are supposed to anticipate the

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1 issues that might come up. You've been sitting on this as a
2 possibility.

3 How the government missed this issue and didn't raise
4 it with me before is beyond me. But any first-year law student
5 reading the Rule 16 disclosures can see that the case -- that
6 the defense is going to hint at an advice of counsel defense
7 here. Whether or not it makes it or not, I don't know. I
8 don't know how you didn't disclose that. It looks as if you're
9 hiding the ball.

10 MR. GELFAND: Your Honor, we're not hiding the ball
11 per se. As a practical matter, Rule 12 lists three specific
12 defenses that have to be disclosed; this isn't one of them.
13 There's case law that expressly says that we don't have to
14 provide advanced notice of this defense in advance of trial.
15 There is some cases where the -- I'm sorry, where the
16 prosecution has actually affirmatively moved *in limine* or
17 otherwise raised with the court aspects of this defense. And
18 courts have ruled in different ways on that. But that didn't
19 happen here.

20 And so as a practical matter, we're entitled to put on
21 a defense.

22 THE COURT: I agree with you. I'm troubled by what
23 looks to be this strategic excision of it from your requests to
24 charge here. It looks as if you were trying to avoid a motion
25 *in limine* being raised by not including it in your requests to

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1 charge. When I asked for requests to charge, I don't want you
2 to hide the ball and leave out the ones that would suggest
3 motions *in limine*. And the problem is that presumably, had you
4 included that in your requests to charge, the government would
5 have been sensitized to the fact that this issue was there and
6 we could have ventilated whether this is a case in which advice
7 of counsel is viable or not pretrial. And because you didn't
8 include it in the requests to charge, we can't do that.

9 MR. GELFAND: Your Honor, I appreciate what the Court
10 is saying.

11 THE COURT: It's a sharp practice. You're not from
12 the Southern District of New York. I can tell you in the
13 Southern District of New York a lawyer who leaves out something
14 like that that they are considering would be regarded as
15 significantly below the standards of ethics that we anticipate
16 from lawyers here. I'm going to be very blunt with you.
17 That's not good.

18 MR. GELFAND: Your Honor, I can represent that that is
19 certainly not our intention.

20 THE COURT: Let me ask you this: Did you think about
21 including an advice of counsel instruction in your requests to
22 charge to me? Was that something that crossed your mind?

23 MR. GELFAND: In an academic way, yes, but we hadn't
24 fully --

25 THE COURT: So when you, in an academic way, thought

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1 about it, tell me what your academic thinking was in deciding
2 not to include it, when you included the other things, like
3 unanimity. In other words, what was your thinking academically
4 in not including that?

5 MR. GELFAND: First of all, not yet having the
6 totality of discovery. Second of all --

7 THE COURT: Sorry. Wait a minute.

8 You're an officer of the Court.

9 MR. GELFAND: Yes, your Honor.

10 THE COURT: You know what the allegations are here.
11 The discovery as to an advice of counsel defense is uniquely
12 within the defendant's custody and control; it involves your
13 client's communications with his lawyer. Whether or not there
14 is a defense to the allegations in the indictment does not bear
15 on whether or not there is a potential advice of counsel
16 defense that you are reserving the right to make.

17 I understand that if the government's discovery
18 teaches you that there's something blatant that your client
19 didn't disclose to his lawyer you may think twice about going
20 for that defense, I get that. But it was clearly very much a
21 plausible possibility at the time in an academic way you
22 decided not to tell me that this might be a defense.

23 I've drafted the proposed jury charge in this case
24 already, subject to editing it depending on how the case comes
25 in. I don't have an advice of counsel defense because you had

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1 not indicated you want one.

2 Thank you.

3 I mean, you know, you've got to elevate your game
4 here. That's sleazy.

5 MR. GELFAND: Your Honor, what I can say is that's
6 certainly not my intention. That's not how I practice.

7 THE COURT: That's all great and good, but it looks
8 like it was. Just because you say that doesn't mean it's true.
9 You thought about it in an academic way; you decided not to
10 include it.

11 I want the full scope of documentary evidence from
12 Mr. Teman and his lawyer. I want it produced to me tonight.
13 And I want you ready to produce it to the government the moment
14 that I so authorize so that there's no delay.

15 Understood?

16 MR. GELFAND: Yes, your Honor.

17 THE COURT: So I want you to have -- in addition to
18 being produced to me, have a full pair of hard copies in court
19 tomorrow morning so that if I conclude it needs to be produced,
20 you can hand it over to the government table.

21 MR. GELFAND: Yes, your Honor.

22 THE COURT: All right.

23 Government, anything?

24 MR. BHATIA: Your Honor, we note that at this point
25 the defendant still has not waived privilege over these topics,

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1 so we couldn't request discovery. These are documents we'd
2 request, but even as of today of jury selection, there's been
3 no waiver of privilege.

4 THE COURT: Sorry. Did you ask for documents relating
5 to communications between Mr. Teman and his counsel?

6 MR. BHATIA: So that was actually the next topic I was
7 just about to get into.

8 We served grand jury subpoenas, as you know, in
9 December. And for those subpoenas, we requested the basis for
10 any believed authority to deposit these checks, among other
11 things.

12 THE COURT: Right. Sorry.

13 But that was a grand jury subpoena that you submitted
14 a few weeks before the trial was scheduled. And I have
15 determined that, given the date on which you submitted them,
16 right before Christmas, weeks before the trial, I respect that
17 you represent there's a *bona fide* basis for seeking a
18 superseder and will assess that for sure after the end of the
19 trial. That's a grand jury subpoena; that's not about the
20 charges brought here. Bottom line is it wasn't realistic to
21 get that material in time.

22 MR. BHATIA: Your Honor, I think it goes to the idea
23 they knew we were asking about the perceived authority. And I
24 think to get to this trial, immediately after your Honor's
25 ruling, I believe it was January 10th, we served trial

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1 subpoenas.

2 THE COURT: Right.

3 MR. BHATIA: We served them electronically to defense
4 counsel, who had accepted them electronically in the past.
5 This time they just never got back to us on whether they were
6 accepting service. And we found out Friday that they weren't
7 accepting service.

8 THE COURT: Defense counsel, is that true?

9 Sit down. One moment.

10 Is that true?

11 MR. DiRUZZO: Yes. But I just want to make sure --

12 THE COURT: Are you telling me that on January 10th,
13 having previously accepted service of subpoenas, you declined
14 to accept service?

15 MR. DiRUZZO: Your Honor, I don't believe we've ever
16 accepted service previously on a grand jury subpoena.

17 THE COURT: I'm not talking about the grand jury
18 subpoena, and you know that. Mr. Bhatia has said they served
19 you trial subpoenas, after I made it clear that the grand jury
20 subpoena wouldn't be resolved until after this trial is over.

21 Yes or no, did you receive trial subpoenas from the
22 government on or after January 10th?

23 MR. DiRUZZO: Yes, we received --

24 THE COURT: Did you accept service of those trial
25 subpoenas, as I gather counsel had been accepting service

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1 throughout, yes or no?

2 MR. DiRUZZO: No, we did not accept service.

3 THE COURT: All right.

4 Government, please serve Mr. Teman with those
5 subpoenas right now. Defense, those are to be responded to by
6 5:01 p.m. today.

7 Defense counsel, you are in the process of blowing
8 your credibility with the Court. Did you tell government
9 counsel -- when did you tell government counsel that you would
10 not accept service of the subpoenas that were served?

11 MR. DiRUZZO: Your Honor, I don't want to make a
12 misrepresentation to the Court.

13 THE COURT: Good.

14 MR. DiRUZZO: We had numerous phone calls between the
15 four attorneys before you. I can't say for sure when exactly
16 the conversation was, but I know for sure that we never made
17 representations that we had the authority on behalf of our
18 client to accept service.

19 THE COURT: Look, do you dispute that on or about
20 January 10th, Mr. Bhatia emailed you trial subpoenas?

21 MR. DiRUZZO: That I do not dispute.

22 THE COURT: And did you say anything to him indicating
23 that you were not accepting service of those?

24 MR. DiRUZZO: I believe that we had email
25 correspondence, and we indicated that we were not authorized to

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1 accept service.

2 THE COURT: What day was that?

3 MR. DiRUZZO: Your Honor, I would have to check my
4 emails. I can't say for sure.

5 THE COURT: Mr. Bhatia?

6 MR. BHATIA: Your Honor, my recollection of the
7 timeline is this: On January 10th, which was the day of the
8 Court's conference, I think now maybe a little over a week ago,
9 we served the subpoenas. Your Honor, at that conference, had
10 requested the defense to respond to the grand jury subpoena
11 petition to quash by last Friday. So that was the 17th.

12 THE COURT: I understand. That relates to the grand
13 jury. I'm focused on this trial here.

14 MR. BHATIA: So, your Honor, it's relevant because
15 that was the first time we had heard in their filing that they
16 weren't accepting service.

17 THE COURT: When was that, on what day?

18 MR. BHATIA: I believe January 18th, this last Friday.
19 So we saw in a filing that defense counsel said we had
20 attempted to serve subpoenas. And so that prompted in our
21 mind, maybe for the first time defense counsel may not be
22 serving these subpoenas. At that point we emailed defense
23 counsel to say, Do you accept service? Please let us know
24 promptly.

25 THE COURT: All right.

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1 MR. BHATIA: And we heard at that point --

2 THE COURT: Mr. Gelfand, is government's factual
3 representation correct that it wasn't until the -- what did you
4 say, the 18th or the 17th?

5 MR. BHATIA: The 18th, your Honor.

6 THE COURT: -- it wasn't until the 18th that you
7 expressly conveyed you weren't accepting service?

8 MR. DiRUZZO: I have no reason to doubt or contest the
9 government's representation at this point, Judge. I don't have
10 the emails in front of me. I just -- I can't say no. I have
11 to say --

12 THE COURT: Government, please, I'm going to take a
13 two-minute recess. Government, serve the defendant right now.

14 (Recess)

15 (Continued on next page)

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1 THE COURT: Government, have you now served the trial
2 subpoenas on the defendant?

3 MR. BHATIA: Your Honor, to be clear, at the beginning
4 of the conference when I asked to serve a subpoena, that's when
5 I served the if-as-when subpoena, and at the second break I
6 served the three trial subpoenas on the corporate entities,
7 which we had sent --

8 THE COURT: Very good. And that's separate.

9 MR. BHATIA: All four of them have now been served --
10 and we can give you a copy, your Honor -- three trial
11 subpoenas, three corporate entities, and one if-as-when
12 subpoena to the defendant.

13 THE COURT: Defense counsel, Mr. Gelfand, you are
14 telling me now that the defendant is going to be defending on
15 grounds of advice of counsel, correct?

16 MR. DIRUZZO: Yes, your Honor, that's what we intend.

17 THE COURT: All right. You are, I take it, therefore
18 waiving the privilege as it relates to communications with his
19 counsel on this subject.

20 MR. DIRUZZO: I believe we have to. I believe that's
21 the nature --

22 THE COURT: There is no attorney/client privilege now
23 that survives as it relates to the defendant's communications
24 with his counsel Mr. Reinitz with respect to the issues in this
25 litigation -- in this case.

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1 MR. DIRUZZO: With that important caveat, the issues
2 in this litigation, because obviously my client has extensive
3 dealings with other litigations, other simple stuff.

4 THE COURT: Attorney/client privilege is a subject
5 matter concept. The subject matter here involves Mr. Teman's
6 dealings with the customers who were denominated as entities 1,
7 2, 3 and 4. I take it that's the scope of the waiver.

8 MR. DIRUZZO: Right.

9 THE COURT: And obviously therefore the checks
10 purportedly drawn on the accounts of those entities that are at
11 issue in this case, you agree that too is within the scope of
12 the waiver.

13 MR. DIRUZZO: Right.

14 THE COURT: All right. Here is what I would like to
15 do. It's 10 o'clock. I think we are safe, Mr. Smallman tells
16 me, for a half hour just while the jury gets acclimated. If no
17 one has anything else to raise, I will be back here at, let us
18 say, at 10:25. I invite counsel to do whatever research you
19 can in the interim with respect to the advice of counsel
20 defense.

21 One of the immediate issues for me involves the
22 defense's opening statement. It is not crystal clear to me
23 whether the government has done anything to date that has
24 created an obligation on the defense to disclose the potential
25 advice of counsel defense here. It's not clear to me either

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1 what if any free-standing obligation the defense might have had
2 with respect to that point. A natural issue is under the
3 circumstances here where the defense did not volunteer the
4 advice of counsel defense or include a proposed instruction to
5 that effect, whether the defense should be permitted to open on
6 that point. I'm not expressing a view one way or the other,
7 but I would welcome some legal guidance on that point. I will
8 see you in 25 minutes.

9 MR. BHATIA: Your Honor, I just want to say on the
10 topic of timing of when the advice of counsel could present
11 itself, the government expects that it could close -- I should
12 say it could rest its case as early as tomorrow afternoon. So,
13 I think nothing you have said about timing, briefings and
14 discovery would get in the way of that, but we just wanted to
15 give your Honor some notice that it could be as early as --

16 THE COURT: Well, I appreciate that, and that's good
17 to know, and obviously the defense needs to have its witnesses
18 here at the close of the government's case.

19 The immediate issue, given the emergence of a possible
20 or apparently committed advice of counsel defense is whether
21 there has been some breach with respect to notice and what if
22 any implications there are for the defense opening.

23 I want to reserve on that. One possible outcome here
24 is that we defer openings until tomorrow morning just to make
25 sure that I get this right. It has somehow gone unaddressed by

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1 all counsel.

2 Again I will see you at 10:30, and please be prepared
3 to give me guidance on that then. Thank you.

4 Mr. Imperatore?

5 MR. IMPERATORE: I just want to raise an issue with
6 respect to notice on advice of counsel. It's still not crystal
7 clear to the government from what defense has said -- even
8 assuming that what they've disclosed on the record today
9 constitutes notice -- whether the advice that was sought really
10 goes to the central issue in this case, which is whether Mr.
11 Teman had authorization to deposit the checks, as opposed to
12 some collateral issue that the lawyer could have been involved
13 in, for example, collection efforts with respect to Bank of
14 America.

15 So we're asking for whether, in connection with notice
16 here, did the defendant actually seek before acting a lawyer's
17 advice with respect to depositing the checks at issue in this
18 case. It's not clear to us from what has been said whether
19 that actually took place.

20 THE COURT: That is what I understood to be the
21 central issue here. The central dispute is whether or not Mr.
22 Teman had the authority to create and deposit these customer
23 checks, and the intent to defraud element, that is, the mens
24 rea with respect to essentially both bank and wire fraud
25 centrally turns on that issue.

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1 The defense appears to be representing that a lawyer
2 told Mr. Teman on a full presentation of the facts that he had
3 the legal right to do what he did. And, defense counsel,
4 that's the question I am putting to you. The documents you
5 will be producing to me at the close of the trial today I
6 expect will shed more light on whether that really happened. I
7 will see you at 10:30.

8 (Recess)

9 THE COURT: All right. Back on the record. It's
10 10:40. I am told that the jury venire will be here at about
11 10:45, so we will be getting going with jury selection shortly.
12 Let me just ask if in the short interim period if counsel have
13 found any apposite legal authority that bears on whether there
14 was either in general or on the facts here a notice obligation
15 on the part of the defense. Yes?

16 MR. DIRUZZO: Your Honor, moments ago we e-mailed your
17 chambers, cc'ing counsel for the government, the case United
18 States v. Wilkerson, 388 F.Supp. 3rd 969, a 2019 case out of
19 the Eastern District of Tennessee that addressed a government
20 motion in limine in a healthcare fraud case where the
21 government attempted to move in limine to require the defendant
22 to disclose an advice of counsel defense in advance of trial.
23 Your Honor, that case we submit is well reasoned, with
24 citations not only to the Second Circuit case of Scully but
25 also to the Supreme Court's decision in Wardius v. Oregon, 412

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1 U.S. 470 at 476, a 1973 case. We believe this case stands for
2 the proposition that an advice of counsel defense, one, is not
3 an affirmative defense, as that concept is known under the
4 civil rules, under Federal Civil Procedure 8, and that it would
5 be unconstitutional to require a defendant to affirmatively
6 require him to provide this information in advance of trial to
7 the government, and that in particular Rule 16, Rule 12.1.2.3
8 do not provide or impose that obligation upon a criminal
9 defendant.

10 The court in that case further notes that a criminal
11 defendant might make up their minds and tell everyone ahead of
12 trial. On the other hand, the defendant could wait and decide
13 what defenses if any to raise once they see what evidence the
14 government presents.

15 So we submit that this case the Court should adopt and
16 it stands for the proposition that what happened here,
17 especially given that the government did not affirmatively move
18 in limine, even though the Court in the Wilkerson case
19 addressed in that context and denied the government's motion in
20 limine, that it just adds to we believe this Court will be
21 settled position to allow us to not only raise an advice of
22 counsel defense but what happened here was appropriate under
23 the circumstances.

24 THE COURT: May I ask you if Wilkerson identifies any
25 contrary authority?

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1 MR. DIRUZZO: Yes. Wilkerson did say that this issue
2 was not without different views, and Wilkerson at the bottom of
3 page 4 of the West.Law pdf does cite to a D.C. District Court
4 case, U.S. v. Crowder, 325 F.Supp. third 131. It's a 2018
5 case. And it cites to also United States v. Meredith, a
6 Western District of Kentucky case.

7 THE COURT: Very good. Thank you.

8 All right. Government, anything?

9 MR. BHATIA: Your Honor, I think at least upon a quick
10 review Wilkerson might be different in the sense that here the
11 government --

12 THE COURT: I will ask you if you found any authority
13 supporting an application to preclude the defense from pursuing
14 an advice of counsel defense either in general or in their
15 opening.

16 MR. BHATIA: No, your Honor.

17 THE COURT: Are you asking me to preclude that?

18 MR. BHATIA: At this point we're not asking your Honor
19 to preclude it, but we do have a different specific request
20 related to the advice of counsel defense.

21 The government, of course, has conferred with people
22 in the office and thought about this issue. At this point the
23 government doesn't have a lot of facts about it. As you know,
24 we just learned about it. The government is therefore
25 requesting an adjournment of jury selection for 24 hours. The

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1 purpose of that is that we're concerned about swearing in a
2 jury and having jeopardy attach prior to really knowing
3 anything about this defense and what the trial might look like,
4 what the scope of discovery is. I don't know if -- we're
5 prepared it take on a heavy lift, your Honor, of course, to
6 review this and ensure that the Court and the parties'
7 schedules are not interrupted unduly, but at the same time it
8 does raise some concern about having a panel sworn while at the
9 same time there might be dozens or hundreds of thousands of
10 pages of discovery out there. There might be obligations that
11 we have to put on a case in which we're responding to this
12 advice of counsel defense, which itself could -- we just don't
13 know a lot, your Honor, and so for that reason we would request
14 an adjournment for 24 hours to select a jury, and that will
15 allow the Court and the government to evaluate whether there
16 might be a need for a further adjournment or whether there is a
17 need for motion practice. It will give us those options, and
18 we believe that swearing in a jury now is going to preclude a
19 lot of those options.

20 THE COURT: Defense?

21 MR. DIRUZZO: Your Honor, we don't believe that's
22 called for under the circumstances, given that the defense
23 doesn't have an obligation to front this information under the
24 rules, and given that the government just last week produced
25 over 5,000 pages of documents.

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1 THE COURT: I'm sorry. Wait a minute. Maybe you're
2 right and maybe you're wrong. And let's assume even that
3 you're more likely right than wrong that there is no
4 obligation. What is the harm in waiting 24 hours? In other
5 words, I could have had more opportunity to reflect on this
6 issue had, for example, you included this in your request to
7 charge. The only reason this issue came up was because when I
8 read the Rule 16 binder it leapt out at me as something that
9 had gone unaddressed but I thought it's obvious that the
10 defense must be considering such a motion. Had I not raised
11 it, we would have been off to the races. What is the practical
12 harm in waiting 24 hours? I mean your client is way within his
13 speedy trial rights. The trial has been -- the indictment was
14 of relatively recent vintage. My job is to get things right.
15 What's the harm in a 24 hour delay?

16 MR. DIRUZZO: Your Honor, may I have one minute?

17 THE COURT: Yes. Your client is not in custody.

18 MR. DIRUZZO: Your Honor, we would defer to the Court.

19 THE COURT: I mean, look, I'm listening, as you can
20 tell, but on the one side of the equation is the incremental
21 inconvenience and extra night in a hotel room for counsel, the
22 trial starting a day late. On the flip side -- but there is
23 not a lot else -- on the flip side this is a consequential
24 issue, and the risk of picking a jury now -- if there is
25 perhaps going to be a longer adjournment for some reason

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1 unexpected, if the jury has been impaneled we have all sorts of
2 double jeopardy issues.

3 Mr. Bhatia is right if I pick a jury and swear a jury
4 that in practice puts us on a time gun. I still expect the
5 trial will begin tomorrow, but this gives us a chance this
6 afternoon to work through the issues, the volume of materials
7 in question, to determine whether or not you have an obligation
8 to produce those materials in response to the subpoenas. It
9 seems to me that better to make those decisions without the
10 artificial urgency of an impaneled jury.

11 Do you have a counter argument?

12 MR. DIRUZZO: No.

13 THE COURT: Counsel, I think what I'm going to do is
14 as follows: I think we will adjourn jury selection to 9:30
15 tomorrow, but I want to see you this afternoon. May I suggest
16 that we reconvene at 2 p.m.? I know you're free. And I really
17 want to work through the full range of issues here. I want to
18 understand -- off the record.

19 I will see you at 2 p.m. but I want to work through
20 the range of issues. I was about to, Mr. Gelfand, go through
21 those -- Mr. DiRuzzo.

22 MR. DIRUZZO: Your Honor, given the Court's ruling
23 regarding the production of documents at 5 o'clock, just after
24 5 o'clock today, we are going to have our client dilligently
25 work on that and pull the stuff together to comply.

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1 Obviously -- well, not obviously -- it's going to take a little
2 bit of time and we're concerned about meeting the Court's
3 deadline. So, we would like the Court to consider if Mr. Teman
4 could be excused from the 2 o'clock hearing. That way he can
5 get right on it and there won't be any delay in meeting the
6 Court's deadline. I just want to bring that to the Court's
7 tension.

8 THE COURT: I'm sorry. Don't you have a legal
9 assistant at one of your offices who could do that? This is
10 important. This involves the attorney/client advice. Mr.
11 Teman is -- counsel, when I speak to you please don't speak to
12 somebody else.

13 Mr. Teman ought to be part of the brain trust here
14 that considers what I am going to be raising at 2 o'clock.
15 There will be issues about whether or not there is anything in
16 the rules or your correspondence that precludes this issue from
17 being raised in opening or pursued at trial. Thus far I'm not
18 seeing anything that precludes that, but I want to be careful
19 about it. I want to be sure that I'm making a thoughtful
20 judgment about the production of documents, if any, that is
21 required here. And it seems to me that the discussion we have
22 may be informative to Mr. Teman as to the risks and rewards of
23 pursuing this line of defense.

24 I am certainly aware of cases in which defendants have
25 regretted running up the flag pole advice of counsel defenses

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1 only to find that the facts did not bear out the predicates for
2 that. That's a risk that a defendant who pursues this route
3 runs. There may be a real value for Mr. Teman as I gather a
4 nonlawyer to hear counsel's colloquy with the Court.

5 MR. DIRUZZO: OK. How about this, your Honor, for
6 your consideration? We believe that we will be able to produce
7 to the government some documents by the Court's deadline. I
8 want to build in a little bit of slack so that we could produce
9 a couple hours later just to make sure we have all the
10 documents that the government wants and that way alleviate my
11 concern that if we don't have strict compliance with the
12 Court's order by 5:01 that we might subject my client to some
13 type of contempt proceeding or what have you.

14 THE COURT: Mr. DiRuzzo, you are prepared to produce
15 to the court pursuant to my request, and to the government
16 pursuant to its subpoena, at 5:01 a good amount of the
17 responsive materials, but given just the press of business you
18 would ask for leave to continue the rolling production into the
19 evening.

20 MR. DIRUZZO: Yes. And we anticipate the production
21 would come to the government via like a Drop Box type vehicle
22 manner.

23 THE COURT: OK. But the concept here is that the
24 government will receive the full production this evening; it's
25 just that it may come in several tranches beginning at 5

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1 o'clock.

2 MR. DIRUZZO: Exactly.

3 THE COURT: But what you're not going to be doing is
4 objecting to the obligation to produce.

5 MR. DIRUZZO: Correct.

6 THE COURT: OK. Can you estimate for me what the
7 volume of the communications of the documents here looks like?

8 MR. DIRUZZO: May I inquire with my client?

9 THE COURT: Yes, of course.

10 MR. DIRUZZO: Your Honor, it's my understanding that
11 it's hundreds of e-mails spread over a timeframe of multiple
12 years, and it would not surprise me that multiple of these
13 e-mails have embedded attachments in them. We believe that a
14 good majority of these e-mails are already in the possession of
15 the government because these e-mails were directed to ABJ,
16 Coney and DiRuzzo.

17 THE COURT: And who were the parties to these e-mails?
18 These are e-mails that would, you say, be privileged but for
19 the waiver of the privilege, or not?

20 MR. DIRUZZO: No, I'm referring to the subpoena
21 directed at the corporations, where the Court ordered for us to
22 produce those corporate documents, records that are subpoena to
23 subpoena duces tecum by 5:01. Those responsive documents would
24 be e-mails between Mr. Teman and individuals at GateGuard,
25 mainly Mr. Teman, Mr. Teman attorney Mr. Reinitz and the

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1 individuals associated with ABJ, Coney and Mercer.

2 THE COURT: Let me break this down. There are really
3 two distinct document issues here. There is likely
4 considerable overlap among them, but just to be precise one
5 issue involves the government's trial subpoenas which they
6 thought they had effectively served on you on January 10 and
7 which you notified them on the 18th or so you were not
8 accepting service of and therefore I ordered be served today
9 and be responded to today, given the disappointing gamesmanship
10 at the back table about those subpoenas.

11 MR. DIRUZZO: That's what I was referring to, correct.

12 THE COURT: Right. As to those, will those materials
13 contain attorney/client communications with the attorney at
14 issue here Mr. Reinitz?

15 MR. DIRUZZO: No. We have Mr. Reinitz -- during the
16 break I was on the phone with him -- that being Mr. Reinitz --
17 letting him know he needs to pull together all of the e-mails
18 between Mr. Reinitz and Mr. Teman, and he is working on that.
19 That was not what I was referring to. Because I believe your
20 Honor said that we had produced those to you tonight and be
21 prepared to produce those.

22 THE COURT: OK. But are those responsive? Because
23 they're coming from Reinitz, you're saying they are not
24 responsive to the government's subpoenas to the company? I
25 mean Reinitz is an agent of the company, right? He is an

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1 employee. So if the subject matter of the government's trial
2 subpoena includes employees or agents of the company,
3 presumably it covers Reinitz. Is he outside lawyer or is he an
4 employee of the company?

5 MR. DIRUZZO: Outside lawyer.

6 THE COURT: But he is an agent of the company? He is
7 a client? The principal is the company; he is their agent?

8 MR. DIRUZZO: Mr. Reinitz would be Mr. Teman's and
9 Gate Guard's agent, yes.

10 THE COURT: And does the subpoena from the government
11 require the production materials in the company's custody,
12 possession and control?

13 MR. DIRUZZO: With the Court's indulgence. Yes, your
14 Honor, paragraph 3.

15 THE COURT: All right. By definition, the agent is
16 controlled by the principal. It seems to me that you can't
17 claim that Reinitz is outside the company's control. He is
18 their lawyer. If the client says give me your reports, the
19 lawyer has to produce those.

20 So, with the benefit of this colloquy and you're now
21 having focused a little more on the subpoena, is it your still
22 your view that materials physically possessed by Reinitz are
23 outside the scope of the government subpoena?

24 MR. DIRUZZO: No, your Honor. But if I may clarify, I
25 was looking for a little bit more time for my client Mr. Teman

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1 to provide the documents to the government that are responsive
2 to the trial subpoena served on the entities. Separate and
3 apart, Mr. Reinitz is working as --

4 THE COURT: But it's not separate and apart, Mr.
5 DiRuzzo. If Reinitz is an agent of the company and the
6 government subpoena to the company picks up documents possessed
7 in the company's control. That includes the agents that the
8 company controls; that includes Reinitz.

9 And you're not disagreeing with that. You're nodding.

10 MR. DIRUZZO: No, I agree there is a substantial
11 overlap.

12 THE COURT: So let's put aside my request for advice
13 of counsel related documents. Let's focus simply on the
14 government subpoena. In terms of the content of that subpoena
15 does -- any reason to think it doesn't reach communications
16 between Reinitz and the company, including its Officer Teman
17 relating to the matters at issue in this case. I assume it
18 must reach that. I haven't seen the subpoena.

19 MR. DIRUZZO: I would agree. There may be some
20 exceptions but for the most part I agree.

21 THE COURT: If that's really the case, we are really
22 talking about attorney/client communications I take it that
23 are -- or communications relating to advice of counsel that are
24 both responsive to the government's trial subpoena and to my
25 oral court order.

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1 MR. DIRUZZO: Exactly.

2 THE COURT: So, let's focus on government subpoena
3 here. You with waived privilege with respect to the
4 attorney/client communications bounded by the subject matter of
5 this case.

6 MR. DIRUZZO: Correct.

7 THE COURT: You have agreed to produce materials
8 responsive to the subpoena to the government today beginning at
9 5 o'clock and then rolling in the evening, correct?

10 MR. DIRUZZO: Correct.

11 THE COURT: So QED, to the extent that attorney/client
12 communications are responsive to the subpoena, those will be
13 produced today whether from the servers of the company directly
14 or from its agent Reinitz, correct?

15 MR. DIRUZZO: Correct.

16 THE COURT: OK. And so your application is simply for
17 grace on my part to relieve you from the obligation to produce
18 all that at 501. You are prepared to produce as much as you
19 can by 5:01 and the balance rolling in the evening as fast as
20 you can.

21 MR. DIRUZZO: Exactly.

22 THE COURT: But to be clear, in effect that is going
23 to discharge, it sounds like, the production obligation of my
24 separate oral order about advice of counsel, because it doesn't
25 sound like there are advice of counsel documents other than

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1 that are possessed by the company or its legal agent Reinitz,
2 correct?

3 MR. DIRUZZO: Correct.

4 THE COURT: OK. So I think we're dealing with one
5 issue, not two, and I would welcome then receiving on the same
6 schedule as the government the documents that you are producing
7 to the government.

8 MR. DIRUZZO: OK.

9 THE COURT: I am just trying to make this easy, but I
10 think working through this, given the privilege waiver, given
11 that the attorney is an agent of the company, and given that
12 the government's subpoena is broad enough to pick up the
13 attorney/client communications here, it seems to me all this
14 stuff gets produced tonight pursuant to the subpoena. You are
15 not disagreeing with that, are you?

16 MR. DIRUZZO: No. My concern I want to make sure my
17 client is not held in contempt because we couldn't get
18 everything out at 5:01.

19 THE COURT: Before I bless what sounds like a
20 reasonable proposal, let me hear from the government. Mr.
21 Bhatia?

22 MR. BHATIA: May we have just a moment?

23 THE COURT: Yes.

24 MR. BHATIA: So, to be clear, we understand that the
25 subpoenas will cover records sufficient to establish the advice

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1 of counsel defense, the one at trial, but we do reserve --

2 THE COURT: Does your subpoena -- without perhaps
3 literally saying those words, because it sounds like you
4 haven't given thought to the advice of counsel defense until I
5 raised it -- does the subpoena nevertheless in its verbal
6 formulation, is it broad enough to pick up materials that are
7 responsive to the advice of counsel defense?

8 MR. BHATIA: The subpoena could pick up some records
9 that are responsive -- that would implicate the advice of
10 counsel defense -- but it may not encompass all of them.

11 THE COURT: Look, you may sit down. I just want to be
12 able to look at Mr. DiRuzzo.

13 Counsel, I am trying to be a force for clarity and
14 good here. It seems to me that given the privilege waiver here
15 what I don't want to have happen is that because the
16 government's formulation in its January 10 subpoena may have
17 not picked up the words "advice of counsel" the defense winds
18 up making an incomplete production.

19 Mr. Bhatia, if it is your intention to broaden the
20 subpoena that you wrote on January 10 and served today to pick
21 that up, may I suggest you take the subpoena back, handwritten
22 "sufficient" to pick up the balance of those documents, so
23 there is no technical issue here under which the defense is
24 able to claim that certain documents fell outside of the
25 subpoena calls.

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1 Mr. DiRuzzo is helping you here because he is
2 acknowledging his expectation on a first read that the subpoena
3 already picks that stuff up, but just so we don't have any
4 verbal gamesmanship here, the better course -- and I will take
5 a five minute recess now -- is to modify the subpoena to
6 explicitly pick up communications bearing on advice of counsel
7 with respect to the matters at issue in this case.

8 MR. BHATIA: We will.

9 THE COURT: I think that solves our -- that closes
10 that gap, correct?

11 MR. BHATIA: That's right.

12 THE COURT: Mr. DiRuzzo?

13 MR. DIRUZZO: Your Honor, we would be amenable to
14 counsel for the government amending the e-mail because it's an
15 e-mail, and that way it's documented.

16 THE COURT: Why don't we do this: We will take a five
17 minute recess. Government counsel will write out what it
18 purposes. They will run it by you. I am sure you will
19 agree -- because you have been agreeable to the idea of
20 proposing this -- and we will put it on the transcript of the
21 hearing when we resume in five minutes. That way you've got it
22 in writing too.

23 Look, in the meantime when I come back in five minutes
24 let's talk through about what is happening at 2 o'clock. I
25 just want to make sure collectively we're issue spotting. It

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1 doesn't sound like the volume of documents here -- although it
2 will give a late night to government counsel -- is so
3 foreboding as to require further adjournment, but we will see.
4 But there obviously is going to be an issue about whether there
5 is something that precludes the defense from proceeding as to
6 advice of counsel. I am not hearing it yet. I'm not seeing
7 anything on first read anything in the Federal Rules or the
8 parties' back-and-forth that in any way precludes it. It looks
9 as if it's a tool in the defense tool box. They can choose to
10 use it with all the risks and rewards that doing so entails. I
11 am not finally resolving that, but it's my first initial
12 instinct, but I will want to make sure that we take that up so
13 there is complete clarity beginning this afternoon at to
14 whether or not that's in play. I want you all to know what is
15 fairly in play in terms of opening statements. I will see you
16 in five minutes.

17 (Recess)

18 THE COURT: All right. Be seated.

19 Government counsel, have you worked up an annotation
20 to your trial subpoena that is sufficient to comfortably
21 embrace the advice of counsel documentation that you are
22 seeking and that Mr. DiRuzzo is said it's prepared to produce
23 today?

24 MR. BHATIA: Your Honor, we actually just finished
25 formulating the proposal. We have not talked about it with

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1 defense counsel.

2 THE COURT: I will stay on the bench. Take a moment
3 with the defense.

4 MR. GELFAND: Your Honor, we're fine.

5 THE COURT: So, defense, Mr. Gelfand, you are fine
6 with what the government is articulating as its addition to the
7 terms of the subpoena that was served in person today?

8 MR. GELFAND: Yes.

9 THE COURT: Great.

10 Mr. Bhatia, would you kindly slowly for the benefit of
11 the court reporter put that language on the record.

12 MR. BHATIA: Yes, your Honor. So we propose to put at
13 the end of the subpoena a phrase that states "For avoidance of
14 doubt, this subpoena calls for the production of any and all
15 documents relating to communications with attorneys and
16 documents reviewed by attorneys relating to the allegations in
17 the indictment, business dealings with the entities listed in
18 the indictment, contracts, terms and conditions and payment
19 terms, the checks listed herein, including but not limited to
20 any communications with Mr. Teman about, or documents provided
21 by Mr. Teman, and any documents that could support an advice of
22 counsel defense.

23 THE COURT: Very good. And we all agree -- I think
24 defense counsel has -- that the subpoena runs to employees and
25 agents of Mr. Teman's companies which specifically includes at

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1 least the agents part attorney Reinitz, right?

2 MR. GELFAND: Yes.

3 THE COURT: I think we're then at peace with respect
4 to the scope of the document production obligation. And, Mr.
5 DiRuzzo, I appreciate your proposal essentially to make a first
6 production at five and then rolling productions thereafter.

7 If you're able to make a first production before five,
8 I know that all concerned -- the government as well as the
9 Court -- would appreciate it.

10 MR. DIRUZZO: Understood, your Honor.

11 THE COURT: I will ask that -- I don't know how
12 voluminous this will be. In the end I will need this in a
13 binder form. I don't know what sort of a legal support network
14 you have here in New York. That will help me. I will give you
15 a little bit of leave on that, but ultimately it's hard for me
16 on the bench to consult something electronic. I proceed more
17 the old fashioned way, as the government has in its Rule 16
18 binder, so please get to that.

19 MR. DIRUZZO: Understood.

20 THE COURT: OK. So I think this leaves us then with
21 what we're taking up at 2 o'clock. This has all happened all
22 of a sudden. I raised this at the very outset of the
23 conference, and it turns out that I awoke a sleeping giant of
24 an issue here, and so I want to make sure that together we have
25 covered all the angles at 2 o'clock so that there aren't any

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1 surprises.

2 One potential issue is whether, as I said, the defense
3 is -- is there something that precludes the defense from
4 opening on advice of counsel. I'm not seeing it, but I want to
5 make sure I have the parties' respective views on that. I
6 would like each of you to commit to whether there is any legal
7 basis for the defense to be precluded from doing that. Again,
8 I'm not seeing it, but I think it's responsible for me to ask
9 for your views.

10 A second question -- and I offer this really for the
11 benefit of Mr. Teman -- is what happens, the defense opens on
12 advice of counsel, then ultimately the facts at trial do not
13 make out the prerequisites of that. I have a memory that what
14 winds up happening in effect is that there is an instruction by
15 the jury that advises them that advice of counsel is not
16 available here, in effect that you have heard references to it,
17 that a requirement is that all material facts be disclosed. If
18 there isn't a factual basis on which the jury could so find,
19 there might be a basis for me to instruct the jury explicitly
20 that it doesn't apply here, although the jury may consider the
21 communications with counsel for what they're worth in
22 evaluating the broader issue of intent. But the issue here is
23 in effect what happens and how it could redound to Mr. Teman's
24 detriment if he opens on advice of counsel and ultimately can't
25 keep the promise. And I want to make sure that your client --

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1 who has obviously been a consumer of legal talent over the
2 years, as the discovery reflects, is mindful of the risks and
3 rewards of going to this place.

4 In other words, it's not at all surprising to me would
5 have thought about an advice of counsel defense -- it leaps off
6 the page reading the Rule 16 material -- but it's another story
7 when you decide to go there. I just want to make sure that we
8 have a discussion about what happens if Mr. Teman can't keep
9 the promise that you are perhaps proposing to make in opening.
10 I want him either out of solicitude for him to be aware of what
11 the consequences might be. So, I welcome counsel's opining on
12 that. Again, I will make a final decision as to any
13 instructions later in the case when there is a factual
14 predicate, but I think given the apparent importance of the
15 issue I want to make sure we have covered this.

16 I will also want a clear statement from the defense
17 that the only advice of counsel that we are talking about comes
18 from Reinitz and not from somebody else. I don't want this to
19 be an Oh Henry story where there is another surprise ending on
20 the last page and it turns out there is another mystery lawyer.

21 I am understanding from what you have proffered that
22 the advice of counsel turns defense, such as it is, turns
23 solely on an advice from Reinitz. I want to make sure that
24 there is clarity about that.

25 Government, are there any other issues that you think

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1 are profitably addressed at 2 o'clock?

2 MR. BHATIA: Your Honor, nothing else for 2 o'clock.
3 I will say we would ask to the extent the defense has any
4 documents already marked as exhibits that might be relevant to
5 the attorney/client defense, that they produce those now. It
6 might help all of us to sort of get started on this.

7 THE COURT: I agree. Defense counsel, as you can
8 tell, I'm disappointed to say the least at the way the trial
9 subpoena was in my view sandbagged. Under those circumstances
10 I think it's absolutely right for me to ride you to produce
11 everything you can as soon as you can, and so to the extent
12 you've got materials now or before 2 o'clock and before 5
13 o'clock, these should be produced forthwith.

14 To be sure, the government could have raised this
15 issue and been explicit about advice of counsel earlier. It's
16 obvious from the Rule 16 material that Mr. Teman has had
17 lawyers drafting legal documents, and he is referencing
18 lawsuits. This was a spottable issue to say the least. I'm
19 certainly not inclined to put over the trial further on account
20 of the production of documents that may be coming today, but
21 I'm also not inclined to give you any incentive or interest in
22 delaying the production.

23 At least some of these materials were -- should have
24 been produced shortly after the January 10 subpoenas -- trial
25 subpoenas that the government served, and only because of what

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1 I regard as described to me as sharp practice were those
2 productions not made earlier. So, I want you to jam on that
3 and get it going promptly.

4 MR. GELFAND: I would just represent for the
5 government's benefit is that I am 99.9 percent sure -- and will
6 be 100 percent sure after we break for this morning -- that
7 anything that is premarked as a defense exhibit has been
8 disclosed to the government. Obviously -- including, by the
9 way, documents, for example, e-mail correspondence, from
10 Mr. Reinitz to various people, which were disclosed early on in
11 this case. So, we will double check to Mr. Bhatia's request
12 and make sure that that's the case, and if something fell by
13 the wayside, we will certainly follow up with that.

14 THE COURT: So when you say predisclosed, does that
15 mean materials that are not in the government's exhibit binder
16 but which have been produced by the defense?

17 MR. GELFAND: Yes, your Honor.

18 THE COURT: And what's the volume of that?

19 MR. GELFAND: The amount of documents that we have
20 disclosed --

21 THE COURT: Disclosed meaning produced, right?

22 MR. GELFAND: -- produced in discovery -- fall into
23 thousands of pages, are anticipated potential exhibits which
24 will obviously depend on what the government does in its case
25 --

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1 THE COURT: Of course.

2 MR. GELFAND: -- is a much smaller sub set.

3 THE COURT: Right. But, in other words, you've
4 produced thousands of pages already to the government. Have
5 you within that universe done anything to tag the documents
6 that are apt to be and if not certain to be defense exhibits?

7 MR. GELFAND: In the context of some discussions that
8 we had with stipulations, we e-mailed them plus or minus about
9 ten or so premarked defense exhibits -- the earliest possible
10 defense exhibits -- that were marked as exhibits. And as
11 hopefully the Court can appreciate, some of what we have marked
12 as exhibits are actually duplicative of government marked
13 exhibits.

14 THE COURT: Sure. When I read through the
15 government's exhibit binder I can't say that I remember. I had
16 no idea who Reinitz specifically was, but I can say I remember
17 seeing communications with him.

18 Presumably if you are going to pursue an advice of
19 counsel defense and are claiming that there was comprehensive
20 disclosure of all material issues, some of that I guess you
21 would contend is memorialized in documents. And I take it
22 those would be among the documents that you would be also
23 intending to offer at trial if you go that route?

24 MR. GELFAND: Your Honor, to be clear, our intention
25 with the advice of counsel defense at trial is to elicit it

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1 primarily through testimony and through e-mail correspondence
2 that is not privileged that has been disclosed to the
3 government and in some cases disclosed by the government.

4 THE COURT: The testimony would be of Reinitz and/or
5 Teman. Are there other people who are privy to the alleged
6 advice of counsel?

7 MR. GELFAND: No, your Honor.

8 THE COURT: All right. So it's ultimately Mr. Teman's
9 decision whether to call a witness and whether to testify
10 himself, but what you're saying is if you're committing to an
11 advice of counsel defense, since there is presumably nobody
12 else who can authenticate written communications -- let alone
13 oral communications -- between Reinitz and Teman, one or both
14 of them needs to testify in order for you to get that out there
15 before the jury.

16 MR. GELFAND: Yes, your Honor. But to be clear, we
17 don't have an intention at least at this point of introducing
18 any documents that are communications between Mr. Reinitz and
19 Mr. Teman. The communications at issue are written
20 communications as opposed to testimonial -- anticipated
21 testimony of Mr. Rinitz are communications between Mr. Rinitz
22 and, for example, Elie Gabay and Jospeh Saleimani.

23 THE COURT: And those would -- would those be relevant
24 to advice of counsel or something else?

25 MR. GELFAND: Only in a very circumstantial way. It's

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1 not the core of the advice of counsel defense, but they clearly
2 establish that prior to the dates at issue Mr. Teman had legal
3 counsel in connection with this issue. So I would say
4 circumstantially it's relevant.

5 THE COURT: Well, they're relevant, you are saying,
6 insofar as they show the existence of a counsel relationship.
7 That may not ultimately be in dispute. But the substance of
8 the communications that Reinitz allegedly had with, let's say,
9 @Mr. Gabay, does the content of that bear on an advice of
10 counsel defense?

11 MR. GELFAND: It does, because the content of that --
12 but circumstantially -- the content of that is Mr. Reinitz
13 explaining to Mr. Gabay and Mr. Soleimani -- and I am
14 paraphrasing -- that they were contractually bound by the same
15 contracts that form the basis of what we anticipate is the
16 authority to issue the RCCs.

17 THE COURT: All right. And so to the extent it bears
18 on the advice of counsel defense, it documented communication
19 between Reinitz, let's say, and Gabay -- I will just use Gabay
20 as an example -- would tend to corroborate that if Reinitz was
21 speaking with Gabay about contractual authority, it stands to
22 reason he was speaking with his client about contractual
23 authority to create an RCC.

24 MR. GELFAND: Yes, your Honor. If that's all we had,
25 there is no advice of counsel defense. I said if that's all we

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1 had, then there is no advice of counsel defense, but I think
2 it's relevant in that it corroborates --

3 THE COURT: Just explain to me -- because you
4 understand the facts of the case better than I -- what would it
5 take then -- without limiting you to it -- what more would it
6 take in your view for there to be a viable advice of counsel
7 defense here? What would need to be disclosed?

8 MR. GELFAND: Testimony -- or other events, but I
9 anticipate it would be testimony -- that Mr. Reinitz had all of
10 the relevant material information to give advice.

11 THE COURT: Right. I mean just again because you
12 understand the back story and I don't, but in general what
13 might that be beyond the existence of a contract that says what
14 it says?

15 MR. GELFAND: First of all, Mr. Reinitz was the
16 counsel for the company for a substantial amount of time prior
17 to this.

18 THE COURT: Right.

19 MR. GELFAND: And so he personally had access to the
20 records of Gate Guard. He who was involved in some capacity in
21 various instances of revising or editing them. He personally
22 communicated with two of the three customers -- in particular
23 Mr. Soleimani and Mr. Gabay -- that are at issue of the three
24 entities listed in this indictment, with respect to their
25 obligations for the money, the fees if you will, that were

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1 ultimately deposited into Bank of America through the RCCs that
2 are at issue in this case. He had communications with Mr.
3 Teman, in particular oral communications that I anticipate he
4 would testify to. He had further communications subsequent to
5 the act -- which I don't think would be relevant at all -- with
6 a lawyer for Mr. Soleimani, when Mr. Soleimani retained
7 counsel. I think the Court can obviously address the relevance
8 of that and the admissibility of that later.

9 As a practical matter --

10 THE COURT: Yeah. I mean I'm not sure -- it's not
11 obvious to me what the communications between outside counsel
12 and outside counsel are. The issue is really what is
13 communicated to the defendant as it informs the defendant's
14 state of mind, because in the end the issue is whether the
15 defendant did or didn't have the mens rea called for by the
16 bank and wire fraud statutes.

17 MR. GELFAND: And to be clear, I agree generally
18 speaking -- obviously we can take up specific language from the
19 jury instruction standpoint -- with what Mr. Bhatia represented
20 to the Court are the elements in essence of reliance of
21 counsel. It's set out pretty clearly in the Scully case. In
22 any event, we believe that Mr. Reinitz's testimony will
23 establish an evidentiary foundation for the jury to conclude,
24 if it wants to, sufficient grounds --

25 THE COURT: Will Mr. Reinitz's testimony be able to

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1 place in time the communications he had with Mr. Teman?

2 MR. GELFAND: Yes, I believe it will. These were
3 ongoing communications for over a year.

4 THE COURT: Sure. But the question is at some point
5 is something left out before Mr. Teman creates and deposits the
6 check? In other words, I have read through the exhibit binder.
7 In at least one of the contracts there appears to be a written
8 provision authorizing the creation of RCCs. There is a
9 separate issue of under what circumstances. Let's suppose a
10 customer disputes that they owe money and conveys that to Teman
11 such that there is a clear dispute between the customer and
12 Teman as to whether or not a debt is owed. Right? The
13 question is whether -- where it's not an undisputed debt but
14 it's a disputed one -- whether Teman has conveyed to his lawyer
15 the customer's denial of a legal -- of an obligation to pay the
16 debt and the customer's factual basis for same.

17 Again, I don't know whether that's all that's going on
18 there, but that at least was -- on the face of the government's
19 exhibits, it seems to me apparent that at least to some of the
20 asserted debts here the customer -- it's not like it's an
21 undisputed debt that Mr. Teman is using his asserted
22 contractual authority to cause to be paid. There appear to be
23 disputes with the customers, and even statements by Teman that
24 his company is shutting down, and then at some point afterwards
25 I gather Mr. Teman uses that purported contractual authority.

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1 The question with respect to advice of counsel is did counsel
2 know before Mr. Teman did that all of that which the customer
3 said, including denying the existence of the debt, and in the
4 face of that did the counsel then say you may nevertheless
5 create a check to pay yourself a debt that the customer denies
6 having.

7 MR. GELFAND: Yes, your Honor. I anticipate that the
8 testimony would be that he did have all of that relevant
9 information.

10 THE COURT: That the lawyer knew exactly what the
11 customer was saying and denying, and in the face of that told
12 Mr. Teman go ahead and write a check on the customer's account
13 without notice to the customer?

14 MR. GELFAND: Yes, your Honor. I don't want to -- I
15 mean the specificity of the words may be a little different but
16 in substance yes.

17 THE COURT: OK. Well, we'll see. That's helpful.
18 But, in other words, I take it that you are acknowledging that
19 it isn't merely the face of the words of the contract but the
20 course of dealings between Teman and the customer that inform
21 what needed to be disclosed before an advice of counsel defense
22 could get to a jury.

23 MR. GELFAND: Yes, your Honor, for the advice of
24 counsel issue. I think separate and apart from the advice of
25 counsel issue there is just a general lack of mens rea defense

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1 on the contract itself which doesn't require --

2 THE COURT: Sure. And you are at liberty to argue
3 that even if there is never a lawyer involved, that Mr. Teman
4 read the contract to empower him to do all sorts of things and
5 that those documents are not consistent with finding intent to
6 defraud beyond a reasonable doubt. You are at liberty to make
7 that argument, and I fully anticipated that from the review of
8 the discovery materials. What was unclear to me from them was
9 whether you intended to add to it the advice of counsel defense
10 with all that it requires. And I now know that the answer is
11 barring a change of heart, yes.

12 MR. GELFAND: Yes, your Honor. And I think this might
13 help, because I gather what the Court is asking in substance is
14 did Mr. Reinitz have more than just the documents, more than
15 just the contracts. And the answer is abundantly yes.

16 (Continued on next page)
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1 THE COURT: But more than that, there is a narrative
2 presumably that exists with each of these customer
3 relationships. I'm ill-positioned at this point to define what
4 parts of that narrative are material as opposed to background
5 noise. But there are -- whatever the material components of
6 the business disputes or business relationship are, you're
7 representing to me that Reinitz knew them, knew that -- that
8 Teman had made sure Reinitz knew them before asking Reinitz for
9 his advice on whether he could create/negotiate the checks.

10 MR. GELFAND: Yes. Or just to be even more precise,
11 that Mr. Reinitz's source of knowledge in some instances was
12 from his own personal interactions. In other words, he's a
13 fact witness as well.

14 THE COURT: Sure. But Mr. Teman needs to know that
15 Mr. Reinitz knew those facts for the advice of counsel defense
16 to apply.

17 MR. GELFAND: Of course.

18 So, for example, there's instances where Mr. Reinitz,
19 at Mr. Teman's request, communicates directly with, for
20 example, Joseph Soleimani about the contractual obligations.
21 So obviously Mr. Teman directs Mr. Reinitz to do that. I think
22 that he obviously knows that Mr. Reinitz did it.

23 And Mr. Reinitz, I anticipate, would testify to
24 those -- within the rules of evidence, but to those
25 interactions and how that, you know, was communicated to

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1 Mr. Teman. Because obviously -- and I want to be clear. Our
2 intention is not to elicit testimony directly about what
3 Mr. Reinitz believed, other than as it was communicated to
4 Mr. Teman.

5 THE COURT: The advice of counsel defense requires the
6 attorney -- the client to have ensured that the material
7 information was communicated to the lawyer. I'm not aware that
8 there's any means of communication that's needed. So whether
9 it's, Read these documents, or, Hear my story, or, here, Speak
10 to the counterparty and report back to me, I can imagine any
11 number of different ways, but the central ingredient here is
12 that the client, Teman, assured that his lawyer knows the
13 material facts before asking for legal advice on them. And
14 you've charted out a confident position that, presumably with
15 respect to each set of entities, the attorney was known by
16 Mr. Teman to know all of the material facts and nevertheless
17 gave him an unambiguous green light to engage in the conduct
18 that the government says was unlawful.

19 MR. GELFAND: That's what I anticipate the testimony
20 would be, your Honor.

21 THE COURT: What is Reinitz's legal expertise?

22 MR. GELFAND: He's a partner at a law firm called
23 FisherBroyles. He is a, kind of, general corporate lawyer who
24 also, as I understand it, has somewhat of a subspecialty in
25 intellectual property, but doesn't limit his practice to that.

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1 And he served as corporate -- I at the very least use
2 the word corporate counsel, meaning counsel to Mr. Teman and
3 some of the entities at issue, not limited to GateGuard, going
4 all the way back to, I believe it was, 2014 or 2015. GateGuard
5 didn't even exist until 2016, and that was at a prior firm that
6 he was at. And then he became GateGuard's counsel over -- I'll
7 get the exact date, but over a year before the alleged
8 allegations.

9 THE COURT: And the conduct at issue is in 2019. From
10 the Rule 16 -- excuse me, from the government exhibit binder,
11 it looked as if there was some issue with respect to GateGuard,
12 I suppose, in 2018? You don't have to answer, but if you're
13 able, since we're talking about it, I'm just curious what --
14 does GateGuard have business issues? Does it go under? What
15 happens with it?

16 MR. GELFAND: No, your Honor. There's a single email
17 that we actually intended to introduce the response to the
18 email, if the Court is referring to an email from Mr. Teman to
19 Ben Soleimani and Joseph Soleimani, the principals of ABJ.

20 THE COURT: I think that this is referenced actually
21 in one of the government's letters on a motion *in limine*, that
22 there had been some business reversal or Mr. Teman had
23 represented to one or more of the customers that his company
24 was having issues in 2018, I thought. I may be misrecalling.

25 MR. GELFAND: Your Honor, I don't believe that you're

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1 misrecalling. I think there is a dispute within -- as to what
2 that factual narrative actually is between the parties and what
3 the documents bear out. But, no, GateGuard continued to
4 operate to this day.

5 THE COURT: Were there ever any civil litigations that
6 actually were brought with respect to any of the victims in
7 this -- not victims, the customer, the alleged victims -- the
8 alleged nonbank victims in this case?

9 MR. GELFAND: To my knowledge, your Honor, none of the
10 victims initiated -- the alleged victims, initiated any civil
11 litigation, and GateGuard did not initiate --

12 THE COURT: Mr. Teman repeatedly threatens legal
13 action in the documents. Did he or his companies ever initiate
14 any with respect to any of the customers at issue here?

15 MR. GELFAND: May I confer about that?

16 THE COURT: Yes, of course.

17 (Counsel and defendant conferred)

18 MR. GELFAND: Your Honor, no litigation was actually
19 filed.

20 THE COURT: May I ask you, before I just turn to the
21 government, and then I'll give you a break so that you can all
22 think about these issues before 2, today you have articulated
23 very confidently the existence of what you contend to be a
24 checkmate advice of counsel defense here.

25 Accepting, for argument's sake, that that is so, with

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1 all the time that there was had between the complaint and the
2 indictment and then after the indictment, why would you put
3 Mr. Teman through the rigors of going to trial if you thought
4 that there was a winning advice of counsel argument here?

5 One of the reasons I'm a little surprised at this turn
6 of events is that while it seemed to be clear that there must
7 be a counsel in the picture here, if the advice of counsel
8 defense was as clear as it is, the government has a history of
9 nolle'ing cases when they are persuaded that, unbeknownst to
10 what they thought when they charged it, they were wrong, why
11 not take a whack at that. I don't want to get into plea
12 discussions or anything like that, but that would seem to me,
13 if you're right, would have been a natural course for counsel
14 to at least raise.

15 MR. GELFAND: Your Honor, without obviously getting
16 into any privileged communications between our clients and us,
17 what I can represent is that over the course of this case --
18 and I understand that to some extent there's just a natural
19 evolution of this happening, the government's entire theory of
20 prosecution has consistently changed.

21 And for example -- and I think this will perhaps shed
22 some light on some of the strategic decisions, if you will --
23 as a practical matter, the government initially arrested
24 Mr. Teman literally without looking at -- much less reviewing
25 or knowing -- the existence of the contracts that are at issue.

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1 And they arrested him on a bank fraud allegation on a criminal
2 complaint out of state. That's a fairly unusual set of
3 circumstances. No federal agency involved in the
4 investigation. I'm not saying there's anything improper with
5 that, but I'm just saying it is unusual.

6 When we brought the existence of the contracts to the
7 attention of the U.S. Attorney's Office, the theory of
8 prosecution just kept changing, where it was basically no
9 matter what the defense brings to us, we'll just basically
10 draft a narrative that isn't -- I'm not saying maliciously, but
11 that essentially isn't, You're right, we should have looked at
12 these contracts in advance; we should have understood these
13 contracts in advance.

14 And furthermore, we weren't fully confident that we
15 were intending to proceed on an advice of counsel defense until
16 very recently. And one of the reasons why is because the
17 government announced that they were intending to supersede,
18 which they have the right to do. They ultimately superseded on
19 January 2nd. They told us in broad strokes that there would be
20 additional counts by our fraud counts, etc.

21 At that point we knew there was going to be a new
22 operative charging document. And we didn't even have the
23 charging document and these specific allegations in the
24 indictment, which, of course, would inform the decision of what
25 to raise and when to raise with the prosecutors. To state the

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1 obvious, we need to know what the charges are before any
2 defenses are committed to.

3 That, to be clear, was January 2nd, approximately
4 three weeks ago. And so it's been a moving train. We believe
5 that Mr. Teman obviously has announced to this Court that, you
6 know, he is exercising his right to a trial. And, you know,
7 we've prepared accordingly.

8 THE COURT: Fair enough.

9 I was eager to understand the context for not
10 attempting to get the government to drop the charges. For
11 better or worse, you've explained what the series of events
12 was, and I appreciate it.

13 MR. GELFAND: Thank you, your Honor.

14 THE COURT: All right.

15 Is there anything we need to take up before I see you
16 at 2 o'clock?

17 MR. BHATIA: Nothing.

18 THE COURT: All right.

19 MR. DiRUZZO: Just one thing, your Honor.

20 I assume that we can leave our stuff here in the
21 courtroom; it will be locked.

22 THE COURT: Mr. Smallman?

23 THE DEPUTY CLERK: It won't be locked.

24 THE COURT: It won't be locked. I think it's
25 historically proven a safe place, but I think you'll need a

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1 GateGuard or something to protect it. I can't give you
2 lock-solid assurance, but I think it's pretty safe.

3 MR. DiRUZZO: Okay. Thank you your Honor.

4 THE COURT: Very good. I'll see you at 2 o'clock.

5 Thank you.

6 But, look, do, everybody, issue a spot here. I want
7 to make sure that once we proceed to trial, we don't have
8 unexpected surprises. I want counsel always to know what the
9 ground rules are.

10 See you at 2 o'clock. Thank you.

11 (Luncheon recess)

12 A F T E R N O O N S E S S I O N

13 2:07 P.M.

14 THE COURT: All right.

15 Be seated, counsel. Welcome back.

16 Thank you for gathering this afternoon just to follow
17 up on the colloquy that we began to have about the emergence of
18 advice of counsel as a potential issue in the case.

19 I should note that having reviewed some of the case
20 law during the break, I am reminded that the shorthand locution
21 that we all tend to use in an advice of counsel defense is, in
22 fact, not correct; and as *Scully* makes clear, the proper
23 formulation relates to advice of -- to evidence of advice of
24 counsel as bearing on the government's burden in establishing
25 the intent requirement.

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1 In any event, to the extent that I -- and presumably
2 everybody else here -- slips into using the locution "advice of
3 counsel defense," I will take it as mutually understood that
4 that's just a shorthand, and what we all mean to say,
5 consistent with *Scully*, is advice of counsel as a component of
6 the jury's analysis as to intent.

7 All right. Before we broke, I identified at least
8 three issues that I thought would be worth raising with you.
9 Let me go through the issues I have in my mind -- I've come up
10 with a fourth -- and then see what else you all have.

11 The first issue is whether there is any application by
12 the government or any basis to preclude or limit what the
13 defense can do in opening with respect to advice of counsel.

14 MR. BHATIA: No, your Honor, there's no application
15 from the government at this point to preclude any opening on
16 advice of counsel.

17 THE COURT: Very good.

18 I didn't think there would be, but I wanted to give
19 you the opportunity.

20 MR. BHATIA: Thank you.

21 THE COURT: All right.

22 Defense, is there anything you want to bring to my
23 attention *vis-à-vis* opening statements with respect to this
24 issue? You're not required to do so, but I'm always eager
25 to -- nobody wants to get a sustained objection. If there's

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1 something you feel you need to or would benefit by alerting me
2 to, I'm happy to consider it.

3 MR. DiRUZZO: Sure, your Honor.

4 Just conceptually, I think advice of counsel,
5 self-defense, defense of others, duress, all of those are
6 appropriately made to the jury in opening.

7 THE COURT: You're not going to be making a
8 self-defense --

9 MR. DiRUZZO: No, no, no.

10 THE COURT: I'm sorry.

11 MR. DiRUZZO: But just those -- what we typically
12 think of as reasons why they call it an affirmative defense,
13 why you call it as bearing on the jury's consideration of
14 intent or *mens rea* is appropriately -- appropriate for defense
15 counsel to raise it at opening; and then, you know, it becomes
16 part of the case. But there is nothing that, from my view,
17 precludes a defense counsel from doing that before the jury.

18 THE COURT: And I'm in agreement.

19 I think the case law that I have seen, based on an
20 early peek, does suggest that there are sometimes situations in
21 which there's been a government motion *in limine* and in which
22 one can reliably make a judgment beforehand whether there is a
23 basis or not for such a defense. And in the case in which one
24 could actually get to clarity before the opening, that might
25 have implications. We're not in that case.

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1 Quite to the contrary, defense counsel has proffered
2 that they have evidence that will check all the boxes with
3 respect to an advice of counsel instruction, we'll see. But
4 there's certainly no basis for precluding your referencing it
5 in opening.

6 All right. The second issue involves -- and again,
7 this is entirely conjectural, but I like to plan. One scenario
8 is that there will be sufficient evidence for the jury to find
9 that all the ingredients of an advice of counsel defense are
10 met. If that is the case, *Scully* certainly provides a very
11 useful template for what an advice of counsel instruction might
12 look like.

13 The alternative scenario though involves one where the
14 Court can determine essentially as a matter of law that
15 material facts were not shared with counsel. Again, no reason
16 to assume one way or the other whether that will be true here.
17 But just for the purposes of making sure that the Court is
18 prepared, I am interested in your judgment about what happens
19 if the defense opens, in effect, on advice of counsel, and the
20 evidence then doesn't permit a jury to find all the
21 ingredients, for example, material disclosure, disclosure of
22 all material information to the lawyer are met; or that, for
23 example, the client didn't abide by the lawyer's guidance as to
24 how to proceed in the face of those disclosures.

25 I'd welcome counsel's judgment as to what the

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1 instruction looks like to the Court under that situation.

2 MR. BHATIA: Your Honor, it's something we would have
3 to give more thought to on the wording of an instruction. But
4 we do believe that it is within the Court's discretion to give
5 an instruction to the kind that you referenced before, saying
6 it's not for the jury to consider the advice of counsel, and
7 then elaborate on that. I think there are different ways to
8 give that type of instruction; but we do think it's within the
9 Court's discretion to give that.

10 THE COURT: My memory is that even where an advice of
11 counsel instruction is inappropriate, the conversations with
12 the lawyer, nevertheless, are received and may be considered as
13 they bear on the defendant's intent. The issue is really how
14 to package that for the jury in a situation where there have
15 been noises made about an advice of counsel defense. And I
16 would want to make sure that the jury was well-instructed that
17 that defense doesn't apply.

18 So, look, it's premature to solicit an instruction for
19 a fact pattern that has not been factually triggered, but I
20 want each of you to do your homework on that so that when and
21 if we get there, and there's a scenario under which the trial
22 moves quickly, I immediately get something in writing from you.
23 So both sides are charged with being prepared in the event that
24 we wind up in that place to be able to give me your written
25 guidance.

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1 Yes.

2 MR. GELFAND: And we'll certainly do so, your Honor.

3 Just as, kind of, food for thought, for lack of a
4 better way of putting it, I think that there's a basis to
5 include additional language in a general good-faith
6 instruction, which was submitted by both parties outside of
7 advice of counsel, that would basically draw the jury's
8 attention as to what they can and can't consider.

9 THE COURT: Right. The issue is you are making a --
10 you are going out not on a limb, but you are making a
11 judgment -- you are essentially putting advice of counsel out
12 there in a way that may or may not require some commentary for
13 the Court, if ultimately the evidence doesn't permit that form
14 of a defense. That's a choice. We'll see. And you'll guide
15 Mr. Teman as to how far it makes sense strategically for the
16 defense to go in an opening on this point.

17 My concern is that with you going there, I want to
18 make sure that I am ready to instruct the jury in a way that
19 corrects any misapprehension, if needed. And I agree with you
20 that one forum in which to do that might be under the
21 good-faith header or it might not. But there is a scenario
22 under which I need to say something, and I want you all to be
23 at work on what that would be on that scenario.

24 MR. GELFAND: Absolutely, your Honor.

25 The other thing I just wanted to just offer for the

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1 benefit of the Court and the record is that we have discussed
2 this issue with our client. And I believe that he understands
3 the ramifications of anticipating that we will lay a sufficient
4 evidentiary foundation for an instruction; and that the Court
5 could theoretically conclude otherwise based on what actually
6 happens at trial.

7 THE COURT: The ramifications being what? Without
8 probing into attorney-client communications, if you could
9 proffer what the ramifications, as you refer to them, are, I
10 would welcome that.

11 MR. GELFAND: Yes, your Honor.

12 First of all, that the Court -- that there is -- just
13 to back up 30,000 feet, that there is such a thing as an advice
14 of counsel instruction within the Second Circuit. That the
15 language is obviously subject to the Court, but generally
16 includes pretty well-settled ingredients.

17 That there is a possibility that, first of all, the
18 Court would not give that instruction based on the evidence
19 that actually comes out at trial, regardless of what we
20 anticipate the evidence is going to be. And that in the event
21 that the Court does not give that instruction, there's also
22 certainly a possibility, if not a probability, that the Court
23 would instruct the jury so as not to permit the jury to
24 essentially go down a road that the law doesn't permit them to
25 go down.

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1 THE COURT: And depending on what counsel have said in
2 their opening, there may be a need to be more pointed in
3 instructing them why the advice of counsel defense doesn't
4 apply.

5 MR. GELFAND: Yes, your Honor.

6 THE COURT: I mean, again, we're dealing with
7 possibilities.

8 All right. May I take a moment and just inquire of
9 your client?

10 MR. GELFAND: Yes, your Honor.

11 THE COURT: Mr. Teman, good afternoon.

12 THE DEFENDANT: Good afternoon, your Honor.

13 THE COURT: You've been obviously listening
14 attentively to this. I want to make sure though that you are
15 well-informed, so as in conjunction with your lawyers, to guide
16 how they choose to defend you in their jury addresses in
17 particular.

18 Have you had an opportunity to discuss so far at
19 length with your counsel the pros and cons of anchoring your
20 articulation of the case to the jury at trial heavily on an
21 advice of counsel "defense"?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: All right. Very good.

24 And without getting into the detail, have counsel
25 advised you of what, in their judgment, the pros and cons of a

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1 trial defense along those lines would be?

2 THE DEFENDANT: In great detail, your Honor.

3 THE COURT: Okay. Very good. I'm glad to hear it.

4 I don't have anything further to inquire about that.

5 Again, just, counsel, be prepared.

6 I'm not sure, Mr. DiRuzzo, if you're the right one to
7 ask, but I'll turn the floor to you and you let me know.

8 I just want to confirm that the only lawyer relevant
9 to the advice of counsel instruction is, in fact, Mr. Reinitz;
10 there's no other lawyer as to whom this instruction pertains.

11 MR. DIRUZZO: Correct.

12 THE COURT: Okay.

13 Final question for me, and then I'll open the floor if
14 there's anything else worthy of consideration, involves jury
15 selection tomorrow. I don't think the existence of a potential
16 advice of counsel issue in the case changes anything I would
17 say to the venire about the case or any questions I would ask.

18 The description of the case, which I've lightly
19 modified, but not in consequential ways, I don't think is
20 changed by the potential of a "defense" along these lines. I
21 already was going to be asking the jury about, you know,
22 lawyers in their family and friend group and legal knowledge on
23 their part. I don't think it's necessary to start probing
24 further their views generically of lawyers.

25 But since the case has taken this turn, let me just

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1 ask counsel if anyone thinks there's anything I ought to be
2 sensitive to in voir dire, now that we know that this is part
3 of the case?

4 MR. BHATIA: Nothing, your Honor.

5 I think the questions prior remain the same. Maybe
6 the weight and the way we think about them as far as cause
7 challenges might change, but I think the questions should
8 remain the same.

9 THE COURT: Defense?

10 MR. GELFAND: Your Honor, I agree.

11 And the one thing -- and I think this would be
12 included in the Court's voir dire anyway is we had included
13 Ariel Reinitz's name as a name that they --

14 THE COURT: Right.

15 MR. GELFAND: Obviously we just want to make sure no
16 one has been represented by Mr. Reinitz or --

17 THE COURT: Yes. His name will be on the list and
18 I'll leave it at that.

19 He's a New York lawyer, right?

20 MR. GELFAND: He is. He's with a firm called
21 FisherBroyles, which has --

22 THE COURT: Fisher, last name?

23 MR. GELFAND: Broyles, B-R-O-Y-L-E-S.

24 THE COURT: Is that on the list of entities?

25 MR. GELFAND: It is not on the list.

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1 THE COURT: Okay. Then let me add it to the list
2 alphabetically. Fisher, spelled B-R-O-Y-L-E-S?

3 MR. GELFAND: Correct.

4 THE COURT: How big a firm is that? It's not one
5 that's familiar to me.

6 MR. GELFAND: He had said a couple hundred lawyers --

7 THE COURT: Oh, wow.

8 MR. GELFAND: -- based around the country.

9 He was previously -- I don't know if the Court cares
10 about this, he was previously with Lowenstein Sandler.

11 THE COURT: Is that name going to come up?

12 MR. GELFAND: Only if he was going to say, I
13 previously worked here, in a very background way.

14 THE COURT: But he wasn't at Lowenstein when he
15 advised Teman in connection with this case?

16 MR. GELFAND: His relationship with Mr. Teman began
17 when he was at Lowenstein. However, with respect to the very
18 concrete advice relevant to this case, he was at FisherBroyles.

19 THE COURT: Anyone want me to ask about Lowenstein
20 Sandler? It sounds like it will come up only as part of his
21 professional background. Sounds unnecessary.

22 MR. BHATIA: I don't think we need to reference it.

23 MR. GELFAND: I would agree with the Court. I just
24 wanted to raise that.

25 THE COURT: Fine.

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1 Look, then I'll just say the FisherBroyles law firm,
2 just so that they have some idea what type of entity we are
3 talking about.

4 Okay. And I take it there's nothing, defense counsel,
5 you know -- there's nothing about Mr. Reinitz's practice or
6 something that's going to come out that would be
7 attention-getting or the kind of thing that either side would
8 want to know with respect to the jury's reaction to? His
9 practice sounds pretty meat-and-potatoes.

10 MR. DiRUZZO: For example, it's not like he represents
11 Mr. Avenatti or some other famous --

12 THE COURT: Just to choose a random person on the 13th
13 floor of this courthouse.

14 MR. DiRUZZO: Right, right. Something along those
15 lines. He doesn't represent, as far as we're aware, any person
16 of public fame or anything like that that would generate some
17 type of feelings one way or the other from the jury.

18 THE COURT: All right. Very good.

19 All right. So those are all the questions I have for
20 you. And you've got your homework assignment about both the
21 instruction and the instruction in the event the elements
22 aren't met.

23 Let me just go around the horn and, beginning with the
24 government, ask if there's anything else, given all the ferment
25 this morning, that you wanted to raise.

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1 MR. BHATIA: No, your Honor. I think once we get to
2 take a look at the documents, we might have more thoughts to
3 provide; but for right now, we'll take a look and then we'll
4 see where we go from there.

5 THE COURT: Great. Look, I'm happy for you to give
6 more thoughts at that point. Given the preview that
7 Mr. Gelfand gave though, it sounds as if the way in which they
8 intend to establish the elements of advice of counsel relies
9 substantially more on oral testimony than the documents. So
10 the documents may give you some insight, but it sounds like
11 they're really not going to allow you to answer the question
12 whether there will or won't be evidence allowing all the
13 pillars of an advice of counsel instruction to be met.

14 MR. BHATIA: Understood.

15 THE COURT: All right.

16 Defense, anything from you?

17 MR. DiRUZZO: No, your Honor. Although I did want to
18 provide, with my opposing counsel, a flash drive with our first
19 tranche of document production.

20 THE COURT: Great. I'll let you give my copy to my
21 law clerk, and the government's to it.

22 MR. DiRUZZO: Sure.

23 THE COURT: Let me ask, we're going to have the jury
24 come in at 9:30 tomorrow or as soon thereafter as the jury
25 assembly -- jury clerk is able to pull names and bring them

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1 over here. I expect that will be in short order.

2 So the question is does anybody expect -- what is the
3 likelihood that we'll have business to take up tomorrow morning
4 that will last more than a half hour? You are obliged to be
5 here, per my usual practice, at 9. The question is ought you
6 be here earlier?

7 MR. DiRUZZO: Your Honor, from Mr. Teman's behalf, I
8 don't believe that we're going to have much; although, as a
9 matter of full disclosure, we're still -- "we" being the
10 attorneys writ large, still working on some stipulations
11 regarding bank documents and the like.

12 THE COURT: Does it make sense to, just in an excess
13 of caution, have you here at 8:30 tomorrow? And I say that not
14 wanting to punish you, but given that the government is going
15 to be reviewing a bunch of documents into the evening, heaven
16 knows what might get stirred up with that. Once the jury
17 venire is here, we're going to get started with them.

18 I have a little voice here -- not literally -- that is
19 saying to me it's prudent for us to have an extra bit of time
20 together in case something else comes up.

21 MR. DiRUZZO: We have no problem with that, Judge.
22 Half an hour is not going to move the needle.

23 THE COURT: All right. Then why don't we plan on
24 being here at 8:30 in the morning.

25 Counsel, if there's anything of consequence you intend